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HANDBOOK

OF

JURISDICTION AND PROCEDURE IN UNITED STATES COURTS

By ROBERT M. HUGHES, M. A.
OF THE NORFOLK (VA.) BAR
Author of HANDBOOK OF ADMIRALTY LAW

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In Memoriam

ROBERT W. HUGHES, LL. D.

U. S. District Judge

1874–1898.

PREFACE.

THIS treatise is designed to fulfill the usual functions of the Hornbooks on the subject of which it treats. It does not purport to be an exhaustive or elaborate discussion, as such a plan would involve several volumes, instead of one. It is, however, intended to be a means of ready reference to the law on those questions of ordinary routine which the author's experience as a specialist in federal practice has taught him most frequently arise. It is believed that the need exists for a work of this character, notwithstanding the several excellent text-books covering the general subject which go into much greater detail. The work is designed, also, for use in law schools, where the need of such a treatise seems to be specially apparent. The author has taken great pains to adapt it to this need. In order to render it more available for this purpose, he has inserted in the appendix a table of illustrative cases, which he hopes will be found useful by those teachers who prefer the case system.

It has seemed to the author much better and simpler in the discussion of the subject to commence with the inferior courts and follow up through the courts of last resort, though that is not the usual scheme adopted by other text-books on the subject. While this plan involves some duplication and cross-referencing in case of subjects of which the different federal courts have concurrent jurisdiction, its advantage in enabling the student to trace a case from its inception to its final conclusion is so great as to have convinced the author that it is the best method of treating the subject.

In the discussion of so much detail, mistakes are inevitable, and, although the author has endeavored to exercise the utmost care, he cannot hope to have escaped them. He begs the indulgence of the bar if any such have occurred.

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(Pages 527–574.)

A HANDBOOK

OF

FEDERAL JURISDICTION AND PROCEDURE.

INTRODUCTION.

WHAT IT COMPREHENDS.

The subject of federal jurisdiction and procedure includes the body of laws administered in the federal courts, and the organization and powers of the different courts charged with the duty of administering those laws.

The federal government being one of delegated powers only, the questions coming before the federal courts for discussion and decision necessarily are only those which the federal Constitution, or the acts of Congress passed in pursuance thereof, have intrusted to those courts.

The subject logically resolves itself into the following general analysis, which will be followed in this work:

A. The law administered and its origin:
   (1) Solely statutory.
   (2) Composed of
      (a) Federal statutes;
      (b) State laws.

B. The courts administering the federal law:
  (1) The courts of original jurisdiction:
    (a) The District Court.
      (1) Its criminal jurisdiction;
      (2) Its civil jurisdiction.
    (b) The Circuit Court.
      (1) Its criminal jurisdiction;
      (2) Its civil jurisdiction.
    (c) The Supreme Court.
    (d) Certain miscellaneous courts of no general interest; e. g., Court of Claims, territorial courts, etc.
  (2) The courts of appellate jurisdiction:
    (a) The Supreme Court.
    (b) The Circuit Courts of Appeals.

CHAPTER I.

OF THE SOURCE OF FEDERAL JURISDICTION AND THE LAW ADMINISTERED BY FEDERAL COURTS.

1. The Source of the Jurisdiction.
2. Derivation of Powers of Federal Courts.
3. No Federal Common Law.
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5. Same—Law of Local State when No Written Federal Law Applicable.
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7. Same—Unwritten Law of Local State.
8. Same—Construction of State Statute.
9. State Law of Title to Real Property.
10. Contract or Personal Relations.
11. Not Bound by State Law in Questions of General or Commercial Character.

THE SOURCE OF THE JURISDICTION.

1. The jurisdiction administered by the federal courts arises exclusively from the federal Constitution and the laws and treaties made under its authority.

The dual system of government under which we live renders us subject to the Constitution and laws of our state in most matters of local concern, and to the federal Constitution in national and international matters. This latter Constitution, becoming effective thirteen years after the independence of the original states, and only adopted after great opposition, is a constitution of limited scope; containing simply the powers therein expressly granted, and leaving with the states all powers not enumerated and too vast to be numerable.

In the conflict along the necessarily uncertain border land between those federal powers expressly granted and those cautiously and jealously withheld, it required but little pre-

science to realize that a system of national courts was necessary to protect the new government in retaining and defending the privileges and duties imposed upon it by this new and untried document. The experience of the states under the Articles of Confederation had taught this beyond peradventure. And our history from the adoption of the Constitution to the present time has shown beyond question that if state courts alone had been intrusted with the duty of construing the Constitution, especially in those doubtful and difficult questions as to the relative powers of the states and the nation, it would have been emasculated and rendered impotent to accomplish the objects for which it was designed. The national courts and the long line of great jurists who have sat in them have saved it from this fate, and given it the vigor and vitality which permeate the nation. If, as some say, they have made of it an instrument which its original draftsmen never designed and of which they never dreamed, it is but just to say in their vindication that they have made of us a nation of which our fathers never dreamed.

The judicial power of the United States courts, as a whole, is conferred by article 3, § 2, par. 1, of the Constitution, which provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

It will appear, when we come to consider the distribution of this general mass among the different federal courts, that Congress has not exhausted the powers conferred upon it by

this section, and that it has left many controversies to the state courts which it could have bestowed upon the federal courts.

DERIVATION OF POWERS OF FEDERAL COURTS.

2. The federal courts are courts of limited jurisdiction, and derive their powers solely from statute.

Except as to the subjects expressly intrusted to the Supreme Court by paragraph 2 of this same section, an act of Congress is necessary before the courts can take cognizance of any of the cases above named.[1]

As the national government itself is a government of delegated powers only, it follows that its courts are courts of special jurisdiction only, and hence the party applying to them for relief must first satisfy them that they have the right to give it.[2] This must be shown by reference to some statute giving the right to the relief sought, for the United States, as a nation, have no common law.

NO FEDERAL COMMON LAW.

3. There is no general common law of the United States as a nation, and hence the common-law rights administered by the federal courts arise incidentally in exercising some statutory jurisdiction conferred upon them.

Before the adoption of the federal Constitution, each state was an independent sovereign, with its own body of laws, the basis of which, as to the original thirteen states, was the English common law. The formation of the national govern-

[1] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; Grover & Baker Sewing Mach. Co. v. Machine Co., 18 Wall. 553, 577, 21 L. Ed. 914.

[2] GRACE v. INSURANCE CO., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Fishback v. Telegraph Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630.

ment made no change in this respect, and the organization of the national courts merely resulted in additional tribunals, before whom questions of general jurisdiction would come in the states where they sat, and in the cases of which they are given jurisdiction. The federal court of a state is not an alien tribunal. It takes judicial notice of all things of which a court of the same state would take judicial notice, and is in many particulars, to be presently discussed, controlled by the decisions of the state court.

The fact that the United States, as a nation, have no common law, was decided very early in its history. In the case of U. S. v. Hudson [3] an attempt was made to prosecute the defendant as guilty of a common-law libel, but the court held that the prosecution would not lie. In the later case of Wheaton v. Peters [4] the Supreme Court reiterated that there was no common law of the United States, but that the law of the state was administered by the federal court, including so much of the common law as that state had adopted.

This subject has undergone much discussion of recent years, and expressions may be found in judicial opinions intimating that there is a body of common law of the United States as a nation. They are in cases where the federal courts have not felt themselves bound by decisions of courts of the state. Properly construed, they do not assert a right to administer any federal common law, but merely a right of independent judgment in deciding questions of general interest in which the nation at large is interested. Or, to put it in another way, the federal courts in such cases are not asserting the existence of any federal common law, but merely claiming the right to differ with the courts of the state on the question what is the common law, when that question is one of general importance. As the federal courts were designed to protect nonresidents, this right of independent

[3] 7 Cranch, 32, 3 L. Ed. 259. [4] 8 Pet. 591, 8 L. Ed. 1055.

judgment as to what is the common law is essential to the accomplishment of the object for which they were created.

This distinction is well drawn by Mr. Justice Matthews in Smith v. Alabama,[5] where he says: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. * * * A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of New York Cent. R. Co. v. Lockwood, 17 Wall. 357 [21 L. Ed. 627] where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state." The language of Mr. Justice Brewer in Western Union Telegraph Co. v. Call Publishing Co.[6] probably means no more than this.

[5] SMITH v. ALABAMA, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508.

[6] 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765.

THE LAW ADMINISTERED.

4. A federal court of original jurisdiction administers the body of law of the state wherein it sits, whenever questions arising under that law come before it in controversies of which it is given jurisdiction.

For instance, federal courts are given cognizance of controversies between citizens of different states. Such a controversy may involve almost any question which might arise in a state court between citizens of the state, whether at common law, in equity, or questions of extraordinary remedies. In the absence of congressional enactments specially bearing upon it, the federal court would try the case substantially as the state court, following the decisions of the latter in some instances, and striking out along its own lines in others. Hence it is now necessary to consider how far state laws and decisions are binding upon the federal courts, and how far they may be disregarded.

SAME—LAW OF LOCAL STATE WHEN NO WRITTEN FEDERAL LAW APPLICABLE.

5. Under section 721, Rev. St. U. S. [1 U. S. Comp. St. 1901, p. 581], the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Under this provision it becomes necessary to consider what is meant by the "laws of the several states." In those commonwealths deriving their jurisprudence from the English common law, the body of law is either statutory or unwritten. The evidence of the latter is the decisions of the courts of the state administering it. Hence it becomes necessary to consider how far each of these two sources of state law is applied in the federal courts.

SAME—STATUTES OF LOCAL STATE.

6. The statutes of a state, in so far as they regulate substantive rights, and also in so far as they regulate remedies on the common-law side of the court, are adopted and enforced by the federal courts where they do not conflict with the federal Constitution and statutes.

Under this principle, state statutes of limitations are enforced by the federal courts in common-law actions.[7] The statute of frauds of a state is enforced in the federal courts.[8] State statutes giving a right of action for damages resulting in death authorize such actions in the federal as well as the state courts.[9] State statutes permitting a plea of set-off, legal in its nature, authorize the filing of such a plea in similar cases in the federal courts, and a cross-judgment upon it, but not with the effect of ousting the equitable jurisdiction of the federal courts, or of conferring an equitable jurisdiction or allowing equitable defenses in such courts on their common-law side, for the distinction between law and equity is sedulously guarded in these courts.[10]

Statutes of Evidence.

State statutes of evidence apply in the federal courts except in so far as they are modified by section 858 of the United States Revised Statutes.[11] Before the enactment of section 858, it had been held that state statutes of evidence were adopted by section 721 as rules of decision in the federal courts on the common-law side.[12]

[7] Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Metcalf v. Watertown, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861; Campbell v. Haverhill, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280.

[8] Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743.

[9] Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439.

[10] Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

[11] 1 U. S. Comp. St. 1901, p. 659.

[12] Haussknecht v. Claypool, 1 Black, 431, 17 L. Ed. 172; Vance v.

This does not mean, however, that state decisions as to common-law rules of evidence are binding on the federal courts. In questions of evidence not statutory, the latter courts decide for themselves what the common-law rule is.[13]

By the act of July 2, 1862,[14] an express provision was inserted in the federal statute law, making the state laws as to the competency of witnesses the rules of decision in the federal courts, not only at common law, but in equity and admiralty also.

Then, after the agitation in relation to the liberation of the negro race had resulted in their emancipation, it was thought necessary to extend the rules of evidence for their protection; and the consequence was a provision in the appropriation act of July 2, 1864,[15] to the effect that in the courts of the United States there shall be no exclusion of any witness on account of color, nor, in civil actions, because he is a party to or interested in the issue tried. This was amended by the act of March 3, 1865,[16] by adding the clause in reference to executors, administrators, and guardians.

Section 858 is therefore a combination of these three acts. Its text is as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or

Campbell, 1 Black, 427, 17 L. Ed. 168; Wright v. Bales, 2 Black, 535, 17 L. Ed. 264; Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559.

[13] Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553.

[14] 12 Stat. 588, c. 189 [U. S. Comp. St. 1901, p. 659].

[15] 13 Stat. 351, c. 210 [U. S. Comp. St. 1901, p. 659].

[16] 13 Stat. 533, c. 113 [U. S. Comp. St. 1901, p. 659].

required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." [17]

Hence, under section 721, state statutes of evidence govern in the common-law courts in common-law cases, in so far as they do not conflict with section 858 and the other sections contained in title 13, c. 17, of the Revised Statutes, whilst under section 858 they apply to equity and admiralty courts as well, in so far as they regulate the competency of witnesses, and do not conflict with the other provisions of that section.[18] But since the enactment of this section, the national courts have a rule of their own in relation to disqualification on account of interest, or in cases where one of the parties, in the absence of statute, would possess an advantage over the other from loss of evidence by death, and in such cases the state statutes do not apply.[19]

In actions by or against executors, etc., it is to be observed that the test whether the other party can testify applies only as between parties to the suit. One who is not a party of record is not excluded merely because he is interested in the result.[20] In this respect the statute differs from many of the state statutes (e. g., section 3346, Code Va.), which makes the parties to the transaction, and not the parties to the suit, the test. And if the suit is not by the executor, administrator, or guardian, the statute does not apply. Hence in a suit by

[17] 1 U. S. Comp. St. 1901, p. 659.

[18] CONNECTICUT MUT. LIFE INS. CO. v. TRUST CO., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Goodwin v. Fox, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805.

[19] Potter v. Bank, 102 U. S. 163, 26 L. Ed. 111; Whitford v. Clark Co., 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500.

[20] Potter v. Bank, 102 U. S. 163, 26 L. Ed. 111; King v. Worthington, 104 U. S. 44, 26 L. Ed. 652.

a widow the opposite party may prove transactions with the decedent.[21]

The provision as to interest does not remove any disqualification except that of interest. As the common-law rule forbidding husband and wife to testify for or against each other was based on reasons of public policy, and not of interest, this statute did not remove that disqualification, and they could not so testify, unless under a state statute allowing it.[22]

The act does not apply to criminal cases, except in relation to exclusion on account of color.[23]

SAME—UNWRITTEN LAW OF LOCAL STATE.

7. The federal court adopts not only the statutory law of the state, but its unwritten law as well, in the main. It follows the decisions of the state courts generally, but with some exceptions hereinafter noted.

SAME—CONSTRUCTION OF STATE STATUTE.

8. Under this principle, the federal court adopts the construction placed upon the statute of a state by its court of last resort.

In such case the state decision construing the statute enters into and becomes part of the statute, as far as the federal court is concerned.[24] Hence, if a state court of last resort holds one of its statutes to be valid as far as the state Con-

[21] Crawford v. Moore (C. C.) 28 Fed. 824.

[22] Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. Ed. 406; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

[23] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

[24] Aberdeen Bank v. Chehalis Co., 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069.

stitution is concerned, such construction will be followed by a federal court.[25]

This principle applies to constructions of the state Constitution as well as to decisions on its Code.[26] It applies to state constructions of its statutes of limitation.[27] Also to questions relating to municipal or county organizations, their powers and boundaries.[28] The federal courts, under this principle, will follow the state decisions as to the effect of its Sunday laws upon the validity of a contract, or the right of recovery for a tort.[29] Also the construction of a state statute regulating assignments to secure creditors.[30]

The above are but illustrations of a numerous class in which the state decisions are followed. The reason is the great inconvenience that would result from having two independent and co-ordinate sets of courts administering the same body of law in different ways. Where no necessity arises of protecting the litigants for whom the federal courts were specially intended, the state decisions will be followed. But when that necessity arises, the federal courts can no longer permit their hands to be tied, and hence the exceptions to the rule spring from such necessities. Therefore the state construction of the state statute is no longer binding when the question is whether that statute violates the federal stat-

[25] Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 49; Wilson v. North Carolina, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865; Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.

[26] Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; Stanly Co. v. Same, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126.

[27] Balkam v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Dibble v. Land Co., 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72.

[28] Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; Forsyth v. City of Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Thompson v. Searcey Co., 57 Fed. 1030, 6 C. C. A. 674.

[29] Hill v. Hite, 85 Fed. 268, 29 C. C. A. 549; Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

[30] May v. Tenney, 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368.

utes or Constitution—in other words, when a federal question is involved.[81] In such cases the federal courts must act upon their own convictions.

For the same reason, when a state court has upheld the validity of municipal bonds issued under a state statute, and rights have been acquired on the faith of such decision, federal courts will not feel bound by subsequent decisions denying the validity of such bonds, but will follow the first decision.[82]

So, if such bonds when issued had not been pronounced invalid by the state court, the federal court will determine their validity for itself, but it will follow the last state decision upholding the bonds.[83]

In considering the validity of municipal bonds, state decisions made before the bonds are issued will be followed.[84]

But a change in state decisions will be considered binding only as to bonds thereafter issued, and a state decision after their issue which affects their validity is not binding.[85]

In the interesting case of Burgess v. Seligman [86] similar principles were applied as to the liability of a stockholder under a state statute. When the federal court has construed such a statute in the absence of any decision by the state court, it will not feel bound to change its decision on account of a subsequent state court decision construing the statute differently.

[81] Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Central Trust Co. v. Railway Co. (C. C.) 82 Fed. 1.

[82] Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520.

[83] Folsom v. Township Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; Wade v. Travis Co., 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060.

[84] Lytle v. Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78.

[85] Douglass v. Pike Co., 101 U. S. 677, 25 L. Ed. 968; Knox Co. v. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280.

[86] 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

STATE LAW OF TITLE TO REAL PROPERTY.

9. The federal courts follow the state decisions in relation to title to real property.

This is because the state decisions establish rules of property on which titles and rights are acquired, and to unsettle them would introduce uncertainty too great to be endured.[37] They do not, however, feel bound to follow the state decisions as to the construction of a particular devise not depending on any general settled rule of property in the state.[38]

CONTRACT OR PERSONAL RELATIONS.

10. They follow the state decisions in general, in matters of contract or in personal relations.

Hence the state decisions are adopted as to the validity of a state marriage and the rights of married women.[39] Also in questions whether contracts made within the state and operating therein are in accordance with public policy.[40]

[37] Suydam v. Williamson, 24 How. 427, 15 L. Ed. 978; Bendey v. Townsend, 109 U. S. 665, 3 Sup. Ct. 482, 27 L. Ed. 1065; LOWNDES v. HUNTINGTON, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615; St. Anthony Falls Water Power Co. v. Commissioners, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497.

[38] Barber v. Railroad Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

[39] Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; Slaughter v. Glenn, 98 U. S. 242, 25 L. Ed. 122; Canal Bank of New Orleans v. Partee, 99 U. S. 325, 25 L. Ed. 390.

[40] Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Hartford Fire Ins. Co. v. Railroad Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

NOT BOUND BY STATE LAW IN QUESTIONS OF GENERAL OR COMMERCIAL CHARACTER.

11. In questions of a general or commercial character the federal courts do not feel bound by the state decisions, but act upon their own convictions of what is right.

This right in a federal court of deciding for itself questions of general law was laid down as to questions arising under the law merchant in the leading case of Swift v. Tyson.[41] Such a right would appear essential in order for a federal court to guard the interests of nonresidents against the possibility of state decisions laying down rules which would work in favor of the resident. The law merchant being common to all civilized nations, a federal court could not tie itself down to the theory of treating it as a local rule of action.[42]

The construction of insurance contracts is also a question of general law, as to which the federal courts feel at liberty to form their own opinions.[43]

The liability of common carriers, the validity of stipulations in their bills of lading, the measure of damages in suits against them, are also matters of general interest, as to which the federal courts act independently, except in so far as such matters are regulated by state statute.[44]

The federal courts also consider the law of master and servant as one of general interest, and not of mere local con-

[41] 16 Pet. 1, 10 L. Ed. 865.

[42] Brooklyn City & N. R. Co. v. Bank, 102 U. S. 14, 26 L. Ed. 61; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; Dygert v. Trust Co., 94 Fed. 913, 37 C. C. A. 389.

[43] Washburn & Moen Mfg. Co. v. Insurance Co., 179 U. S. 1, 15, 21 Sup. Ct. 1, 45 L. Ed. 49.

[44] Myrick v. Railway Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; Hartford Fire Ins. Co. v. Railroad Co., 175 U. S. 91, 98, 20 Sup. Ct. 33, 44 L. Ed. 84; New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

cern; and hence they decide for themselves whether a given case is a case of fellow service or of liability, regardless of the state decisions. As the federal decisions on the subject differ widely from those of some states, this makes the selection of the forum a very important step in many of these cases.[45]

[45] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

CHAPTER II.

THE DISTRICT COURT—ITS CRIMINAL JURISDICTION AND PRACTICE.

12. The Federal Judicial System.
13. The District Court.
14. Criminal Jurisdiction of the District Courts.
15. Criminal Procedure.
16. Procedure by Complaint.
17. United States Commissioners.
18. Place of Trial—Warrant of Removal.
19. Same—Proper Place.

THE FEDERAL JUDICIAL SYSTEM.

12. The judicial power of the United States is vested in one Supreme Court, established by the Constitution, and various inferior courts organized by Congress under the authority of the Constitution.

The Original United States Courts, and Their Evolution into the Present System.

Article 3, § 1, of the federal Constitution, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. It thus appears that the only court expressly established by the Constitution itself is the Supreme Court. The others are all creatures of congressional action.

Acting under this authority in the Constitution, Congress, by the judiciary act of 1789, established the first federal courts, and distributed the jurisdiction among them. They divided the United States, as then constituted, into judicial districts, no district containing more than one state, and established in each district a district court and a circuit court. Since then, as the country grew, additional districts and circuits have been

established. This original act, with subsequent enlargements, now constitutes section 530 of the United States Revised Statutes.[1] These district and circuit courts were given by the original act of 1789 all of the original jurisdiction which the United States courts then exercised, except the small amount conferred upon the Supreme Court. They still remain the courts of the United States in which the great mass of the profession is mainly interested. Until 1891 the circuit court had some appellate supervision over the district court.

Under the original act, a judge, known as the district judge, was to be chosen, who was to hold both the district court and the circuit court in the district over which he presided.[2] The district judge, however, could, of course, not hold the circuit court in cases of appeals from his own decisions in the district court. In order to provide for this case, and also for holding the circuit court in cases of special interest, the nation was divided into larger units, known as circuits, and one justice of the United States Supreme Court was assigned to each of these circuits. This Supreme Court justice could hold the circuit court of any district contained in his circuit. He could sit with the district judge, or, in cases of appeals from the district court to the circuit court, he it was who heard and disposed of those appeals. This continued to be the system until just after the Civil War, when an additional judge, known as a circuit judge, was provided for each circuit; the main object being to relieve the justices of the Supreme Court from the labor of holding the circuit court, as the growth of business in the Supreme Court had rendered it impracticable for them to continue to do much circuit court work. Then by the act of March 3, 1891, establishing the circuit courts of appeals,[3] additional circuit judges were established, and by various special acts some circuits have more than two circuit judges.

There are also many courts of special jurisdiction which have

[1] 1 U. S. Comp. St. 1901, p. 316.
[2] Section 551, Rev. St. [1 U. S. Comp. St. 1901, p. 446].
[3] 1 U. S. Comp. St. 1901, p. 547.

been established since. One of these is the court of claims, established in 1855.[4] Another court of considerable importance is the court of private land claims, established by act of March 3, 1891.[5] There are also the courts of the District of Columbia and the courts of the territories, and then there are the courts of appellate jurisdiction, consisting of the circuit courts of appeals, established by the act of March 3, 1891,[6] and the Supreme Court, which, as already mentioned, was established by the Constitution itself.

It will now be necessary to review the organization, jurisdiction, and practice of these several courts.

THE DISTRICT COURT.

13. The district courts are United States Courts of original jurisdiction, each having territorial supervision over an area known as a judicial district, and held by a judge known as a district judge.

The District Court, and Its Personnel.

This court is held by the district judge, who is required to live within his district. The districts being defined largely by state lines, the territorial jurisdiction of the district courts follows the lines as laid down by the act of the states. When two states agree as to a boundary line which has been in dispute, and the effect of such agreement is to throw into one state territory which had been in another, the corresponding district court extends over such new territory.[7]

The statutes contain various provisions for holding the district court, if for any reason the district judge of that district is prevented from sitting. These provisions will be found in

[4] Sections 1049–1093, Rev. St. [1 U. S. Comp. St. 1901, p. 729 et seq.].

[5] 1 U. S. Comp. St. 1901, p. 764.

[6] 1 U. S. Comp. St. 1901, p. 546.

[7] In re Devoe Mfg. Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764.

sections 587 to 603 of the United States Revised Statutes.[8] The first four of these statutes apply in terms only to cases of disability of the district judge, and apparently do not apply to a case where there is a vacancy in the office.[9] The only provisions expressly applying to vacancies are sections 602 and 603. Apparently, however, the language of section 592, which allows the designation of another judge in case of accumulation of business, would permit such designation, not only when business has accumulated on account of an unusual press of litigation, or on account of disability, but also where there is a vacancy. In any event, if the appointment of another judge to hold court in case of accumulation of business is made, and there is nothing on the record to show that there is an actual vacancy in the office, the act of a judge so holding court could not be questioned, for he would be a judge de facto, and his acts would be binding upon litigants.[10] Sections 591, 592, and 593, allow the additional judge so designated to hold not only the district courts, but the circuit courts.

There is also a provision contained in section 601 of the Revised Statutes providing for the case where a district judge is so interested in a suit that it would be improper for him to sit.

General Nature of the Jurisdiction of the District Court.

As a rule, the jurisdiction conferred upon the district court is that of an exceptional or special character; the great mass of civil controversies of which the federal courts are given original jurisdiction being conferred upon the circuit court. The district court jurisdiction, however, though special in its nature, is very extensive, and covers cases cognizable both in criminal courts, the common-law courts, and the chancery courts, to say nothing of the courts of extraordinary jurisdiction, like the admiralty and bankruptcy courts. The main

[8] 1 U. S. Comp. St. 1901, pp. 479–484.
[9] Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377.
[10] McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271.

subjects of the jurisdiction of the district court are enumerated in section 563 of the United States Revised Statutes,[11] though there are a great many subjects of jurisdiction cognizable by it under special statutes, and not enumerated in that section.

CRIMINAL JURISDICTION OF THE DISTRICT COURTS.

14. The first clause of section 563 of the Revised Statutes gives the district courts jurisdiction of all crimes and offenses cognizable under the authority of the United States committed within their respective districts or upon the high seas, the punishment of which is not capital, except in certain unimportant cases mentioned in section 5412 of the United States Revised Statutes.

As there are but few capital offenses under the federal statutes, this clause gives the district court jurisdiction of nearly all offenses punishable by the laws of the United States. In this connection it must be remembered that there is no such thing as a common-law offense against the United States, but offenses are statutory only; and, in order to sustain a prosecution under this section, some act of Congress other than section 563 must be specified which creates such an offense.[12]

The principal crimes against the United States are contained in title 70 and title 71 of the United States Revised Statutes.[13] There are, however, many offenses against the United States which are not set out in this title, and which are scattered through the federal statutes, but as a rule they are unimportant.

As treason, murder, and the offenses named in section 5345, United States Revised Statutes, are punishable by death, they do not come within the jurisdiction of the district court. All other crimes against the existence of the government contained

[11] 1 U. S. Comp. St. 1901, p. 455.

[12] Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591.

[13] 3 U. S. Comp. St. 1901, p. 3619 et seq.

in chapter 2 of title 70 are cognizable by the district court, and also all crimes mentioned in chapter 3, with the above exceptions. It will be observed that most of these statutes punishing crimes against the person expressly apply to lands or reservations under the exclusive jurisdiction of the United States, or, in case of offenses on the water, to such waters as are not only within the admiralty and maritime jurisdiction of the United States, but are also out of the jurisdiction of any particular state. Under this provision, crimes of this nature committed in a harbor, or in a body of water bounded on each side by the same state, are not cognizable by the federal courts, but the punishment of such offenses is left to the state courts.[14] It has also been held that the statutes giving the federal courts jurisdiction over offenses committed on the high seas apply to the Great Lakes, the Supreme Court holding that in the proper sense of the term the Great Lakes are high seas, just as much as the Mediterranean or the Baltic. This was decided in the case of U. S. v. Rodgers,[15] which was a case where the offense was committed in 1887, and the decision was rendered in 1893. Prior to the decision in that case, however, Congress, by the act of September 4, 1890,[16] had expressly provided for an extension of the criminal jurisdiction of the federal courts over the Great Lakes and their connecting waters.

It is impossible within the limits of this treatise to discuss the statutes defining the various crimes against the United States. It may be said in general that it is not the national policy to create offenses cognizable by the United States courts, except in so far as it may be necessary to see to the proper execution of the federal laws. The great mass of offenses are offenses against the states, and not the United States; and the

[14] U. S. v. ROGERS (D. C.) 46 Fed. 1; SAME v. RODGERS, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071; Ex parte Ballinger (D. C.) 5 Hughes, 387, 88 Fed. 781; U. S. v. Peterson (D. C.) 64 Fed. 145; U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 404.

[15] U. S. v. RODGERS, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.

[16] U. S. Comp. St. 1901, p. 3627.

offenses against the latter relate merely to offenses on the high seas which would not fall under the authority of any single state, to offenses committed on lands under the exclusive jurisdiction of the United States, like forts and military reservations, and to offenses against the customs and revenue laws, the pension laws, the postal laws, and the national banking laws. It is essential to the proper administration of the government that these offenses should be cognizable by the federal courts. Under article 1, § 8, cl. 17, of the Constitution, Congress is given the power of exclusive legislation over the seat of government, and over all places purchased by consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and all other needful buildings. Under this clause the jurisdiction of the United States courts over crimes committed on such places is necessarily exclusive,[17] but even under this clause the letter of the Constitution is followed, and, in case of land purchased by the United States without the assent of the state, the jurisdiction is not necessarily exclusive.[18]

In speaking of offenses exclusively cognizable by the United States courts, the offense, in so far as it is an offense against the federal law, is necessarily exclusively punishable by the federal courts.[19] It must, however, be remembered that in many cases the same act or state of facts may be an offense both against the state laws and the federal laws, and in such case the offender may be prosecuted in both courts, though the first court that arrests him would not permit interference by the other court.[20] The offenses created and defined by the federal

[17] Sharon v. Hill (C. C.) 24 Fed. 726; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264.

[18] U. S. v. Penn (C. C.) 48 Fed. 669.

[19] In re Loney (C. C.) 38 Fed. 101; Thomas v. Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949; Fitzgerald v. Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951; In re Thomas, 87 Fed. 453, 31 C. C. A. 80; Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; In re Waite (D. C.) 81 Fed. 359.

[20] Section 5328, Rev. St. [3 U. S. Comp. St. 1901, p. 3622]; Cross

statutes in reference to federal buildings or other lands owned by the United States are substantially the usual offenses punishable in the state courts. By way of extra precaution, it is provided by section 5391 [21] that anything which is an offense under the law of the state in which such place is situated shall be an offense against the United States and punishable as it is by the state law in force at the time of the enactment of that section, which was on March 3, 1825.[22]

CRIMINAL PROCEDURE.

15. Criminal proceedings in the federal courts are instituted
(a) By complaint before an examining officer, looking to an indictment;
(b) By indictment or information, as the initial step.

PROCEDURE BY COMPLAINT.

16. It is provided that, upon complaint under oath before them, a justice or judge of the United States, a United States commissioner, and certain state officers of the state wherein the offender is found, may have the offender arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognisance of the offense, under procedure agreeable to the usual mode of process against offenders in the state in which the procedure is being conducted.

UNITED STATES COMMISSIONERS.

17. The officers before whom offenders are usually brought under this procedure are the United States commissioners. These officers have various powers, similar on the criminal side to the ordinary magistrates in the judicial systems of the states.

v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287; Crossley v. California, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. Ed. 610.

[21] 3 U. S. Comp. St. 1901, p. 3651.

[22] U. S. v. Paul, 6 Pet. 141, 8 L. Ed. 348; U. S. v. Barnaby (C. C.) 51 Fed. 20.

Section 1014, Rev. St.,[23] also provides that in such case the procedure shall be agreeably to the usual mode of process against offenders in such state. The usual procedure under this section is by complaint on oath before some of the above officers. The fourth amendment to the Constitution provides that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Under these constitutional and statutory provisions, it has been held that a complaint must be on oath, of personal knowledge, and not merely on an oath or affirmation of mere belief.[24] The procedure in such case follows the usual practice of the state, as expressly required by the statute, and the officer issuing the warrant proceeds as the corresponding state officer would proceed.[25] The procedure by indictment or information, in cases where an information lies, is also very common and well known.[26]

The Warrant.

On complaint duly sworn to as above described, the officer issues a warrant of arrest to bring the prisoner before him at a given time and place. It is not necessary, however, that the warrant should be returned before the officer issuing it, for by the act of August 18, 1894,[27] it must be returned by the marshal before the nearest judicial officer who has jurisdiction for a hearing, commitment, or taking of bail; the object of this act being to prevent excessive costs by having commissioners issue warrants for parties at great distances, thereby multiplying both commissioner's and marshal's fees.

The warrant must, as required by amendment 4 to the Con-

[23] 1 U. S. Comp. St. 1901, p. 716.

[24] U. S. v. Burr, Fed. Cas. No. 14,692; U. S. v. Collins (D. C.) 79 Fed. 65; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577.

[25] U. S. v. Sauer (D. C.) 73 Fed. 671; U. S. v. Dunbar, 83 Fed. 151, 27 C. C. A. 488.

[26] U. S. v. Kilpatrick (D. C.) 16 Fed. 765.

[27] 1 U. S. Comp. St. 1901, p. 717.

stitution, particularly describe the person to be arrested. Consequently a warrant not conforming to this requirement would be illegal. As an illustration, in the case of West v. Cabell [28] the warrant was against James West. Under it the officer arrested Vandy West. The warrant was held to be void, even though testimony was adduced to show that Vandy West was really the man who was in the mind of the commissioner when the warrant was issued.

A seal is not essential to the validity of the warrant. If there is no statute requiring it, and the officer issuing it has no seal, but it is merely signed, the warrant is still valid.[29]

United States Commissioners.

When the warrant has been issued and the accused arrested, he is brought before the committing officer for a preliminary examination. The officer before whom he is usually brought in such case is now known as a United States commissioner. By the act of May 28, 1896,[30] the office of circuit court commissioner was abolished, and that of United States commissioner established. This officer has various powers, similar on the civil side to those of a notary public, and on the criminal side to those of a magistrate. His powers are summarized in the case of U. S. v. Allred [31] as follows: "The duties of these officers are prescribed by law, and they are, in general, to issue warrants for offenses against the United States; to cause the offenders to be arrested and imprisoned, or bailed, for trial, and to order the removal of offenders to other districts (Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716]); to hold to security of the peace and for good behavior (section 727 [U. S. Comp. St. 1901, p. 584]); to carry into effect the award or arbitration, or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may arise between the captains and crews of any vessels belonging to the nations

[28] 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643.
[29] Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841.
[30] 1 U. S. Comp. St. 1901, p. 499.
[31] 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273.

whose interests are committed to his charge; and to enforce obedience by imprisonment until such award, arbitration, or decree is complied with (section 728); to take bail and affidavits in civil causes (section 945 [U. S. Comp. St. 1901, p. 694]); to discharge poor convicts imprisoned for nonpayment of fines (section 1042 [U. S. Comp. St. 1901, p. 724]); to take oaths and acknowledgments (section 1778 [U. S. Comp. St. 1901, p. 1211]); to institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder (sections 1982–1985 [U. S. Comp. St. 1901, pp. 1264, 1265]); to issue search warrants authorizing internal revenue officers to search premises, where a fraud upon the revenue has been committed (section 3462 [U. S. Comp. St. 1901, p. 2283]); to issue warrants for deserting foreign seamen (section 5280 [U. S. Comp. St. 1901, p. 3598]); to summon masters of vessels to appear before him and show cause why process should not issue against such vessel (section 4546 [U. S. Comp. St. 1901, p. 3087]); to issue warrants for and examine persons charged with being fugitives from justice (sections 5270 and 5271 [U. S. Comp. St. 1901, pp. 3591, 3593]); and to take testimony and proofs of debt in bankruptcy proceedings (sections 5003 and 5076)."

His duties under section 1014 are assimilated to those of a state committing magistrate, and in holding the preliminary examination of the accused he acts as a state magistrate would act under the state practice.[32] In this respect, however, he is in no sense holding a court of the United States, but is acting simply as a committing magistrate.[33] As the Constitution requires that no warrant shall issue but upon probable cause, it becomes his duty, in holding such examination, and in issuing the warrant in the first instance, to examine into the question

[32] U. S. v. Martin (D. C.) 17 Fed. 150; U. S. v. Greene (D. C.) 100 Fed. 941; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177.

[33] Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982.

whether there is probable cause to believe that the accused has committed any offense. In making this inquiry, he may examine into the facts, and in fact it is usually necessary for him to do so, in order to decide whether the prisoner is entitled to bail.[84] Under section 1015 of the Revised Statutes, the prisoner is entitled to bail in all except capital cases, and the United States commissioner may decide whether to admit him to bail or not; and this he may do either when holding an examination under a warrant issued on complaint, or when the other procedure by indictment has been taken, and the prisoner has been arrested on the indictment.[85] If bail is wanted in capital cases, the commissioner has no power to take it, but in such cases only some federal judge has the power to take bail.

The preliminary examination is a valuable right, and the prisoner can have it either on prosecutions instituted by complaint or by indictment.[86]

If the commissioner thinks that there is probable cause to believe that the accused has committed the crime with which he is charged, he may commit him for trial, a writ being necessary in such case.[87]

Under the sixth amendment to the Constitution, the accused is entitled, among other things, to have compulsory process for obtaining witnesses in his favor. Pursuant to this provision, section 879 of the Revised Statutes [88] gives the commissioner who holds this examination the right to require the defendant's witnesses, in case of offenses on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, to be recognized to appear at that place where the accused will need their testimony.

[84] U. S. v. Smith (C. C.) 17 Fed. 510; U. S. v. Hughes (D. C.) 70 Fed. 972.

[85] U. S. v. Sauer (D. C.) 73 Fed. 671; Hoeffner v. U. S., 87 Fed. 185, 1005, 30 C. C. A. 610.

[86] U. S. v. Farrington (D. C.) 5 Fed. 343.

[87] Erwin v. U. S. (D. C.) 37 Fed. 470, 2 L. R. A. 229; U. S. v. Harden (D. C.) 10 Fed. 802.

[88] 1 U. S. Comp. St. 1901, p. 668.

PLACE OF TRIAL—WARRANT OF REMOVAL.

18. To insure the constitutional guaranty of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, it is provided that, where an offender is committed in any district other than that where the offense is to be tried, the judge of the district where he is committed shall issue a warrant to remove him to the district where the trial is to be had.

SAME—PROPER PLACE.

19. The proper place for the trial of offenses committed within any district is in that district, and the proper place for the trial of offenses committed on the high seas or outside of any district at all is the district where the offender is found or where he is first brought.

Warrant of Removal.

The sixth amendment to the Constitution provides also that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. In conformity to this provision, section 1014 also provides that, where an offender is committed in any district other than that where the offense is to be tried, the judge of the district where he is committed shall issue a warrant to remove him to the district where the trial is to be had. This warrant of removal is required to show on its face that such a trial of some offense is to be had, though it is not very technical in its form. For instance, in the case of Horner v. U. S.[39] the warrant transferring him to another district stated that the prisoner was to be tried "on such counts of the indictment as he can be legally tried on in said district." There was at least one count in the indictment which showed

[39] (D. C.) 44 Fed. 677; 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126.

jurisdiction in the court of the district to try him, and it was held that the warrant was sufficiently definite.

When a judge is requested under this provision to issue such a warrant of transfer, he acts not merely in a ministerial capacity, but in a judicial one; and he may examine into the case, certainly so far as to inspect the proceedings and see that the court to which he is asked to move the prisoner has jurisdiction. As to the question of fact, a certified copy of the indictment is prima facie, but not conclusive, evidence, and would justify him in sending the prisoner on, though he would have the right, in his discretion, to hear additional evidence if he saw fit.[40] When an application is made by the authorities of another district to a judge to remove the prisoner to such district for trial, it ought to show that proceedings have been instituted in such district.[41] The prisoner is entitled to notice of the time when the judge is to examine into the question of sending him to another district, but before any removal an examination or an indictment in one of the two districts is necessary.[42]

The Place of Trial.

Article 3, § 2, of the Constitution, provides that the trial shall be held in the state where the crime shall have been committed, but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed; and the sixth amendment provides that the trial shall be in the state and district wherein the crime shall have been committed. The provisions of these amendments apply only to trials in the federal courts, not to proceedings in the state courts, and they apply only to strictly criminal proceedings, not

[40] U. S. v. Lee (D. C.) 84 Fed. 626; Price v. McCarty, 89 Fed. 84, 32 C. C. A. 162; In re Wood (D. C.) 95 Fed. 288; U. S. v. Greene (D. C.) 100 Fed. 941; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177.

[41] U. S. v. Price (D. C.) 84 Fed. 636.

[42] U. S. v. Karlin (D. C.) 85 Fed. 963.

to contempt proceedings.[43] In furtherance of these constitutional provisions, section 729 of the Revised Statutes [44] provides that the trial of capital offenses shall be had in the county where the offense was committed, where it can be done without great inconvenience. Section 730 provides that the trial of offenses committed on the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought; and section 731 provides that where an offense is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with in either; the word "circuit" in this statute being a palpable misprint for "district." Under these constitutional and statutory provisions, it is evident that the proper place for the trial of offenses committed within any district is that district.

It may be sometimes a difficult question to decide just where an offense has been committed. That depends upon the character of the offense, and the proper construction of the statute creating it. To illustrate, it was held in the case of Palliser v. U. S.[45] that a New York party who wrote to a Connecticut postmaster, offering to buy stamps on credit, against the statute forbidding it, committed his offense in Connecticut, where the letter was received, and the Connecticut district was the proper place where he should be tried. So, too, in the case of U. S. v. Horner,[46] where a lottery ticket was mailed in New York to a party in Illinois, it was held that the offense was triable in Illinois. The Supreme Court, however, has never finally settled definitely where the prosecution for murder should be tried, where the fatal blow was given in one district and the

[43] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; Ellenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801.

[44] 1 U. S. Comp. St. 1901, p. 585.

[45] (C. C.) 40 Fed. 575; 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514.

[46] (D. C.) 44 Fed. 677; 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126.

death occurred in another, though the question is discussed in the case of Palliser v. U. S.[47] and in the case of Ball v. U. S.[48]

The constitutional provision in reference to trying the case in the district where it arose does not, however, prevent Congress from enacting, as it has done in section 730, that the trial of offenses on the high seas, or outside of any district at all, shall be in the district where the offender is found or into which he is first brought.[49]

In U. S. v. Arwo [50] a murder had been committed on the high seas. The murderer was taken into the Southern District of New York, and turned over to the authorities there. The vessel containing him stopped five days at quarantine at the mouth of the lower harbor of New York City, which was in the Eastern District of New York. The Supreme Court held, in an opinion containing no discussion of the question, that he could be tried in the Southern District, where the officers had carried him.

Under sections 5570 and following [51] there are various regulations in relation to guano islands which have come under the jurisdiction of the United States. One of these sections provides that crimes committed on these islands shall be considered as committed on the high seas. In the case of Jones v. U. S.[52] it was held that such offenses, under section 730, could be tried in the district where the offender was brought.

[47] 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514.

[48] 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377.

[49] U. S. v. Dawson, 15 How. 467, 14 L. Ed. 775; Cook v. U. S., 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906.

[50] 19 Wall. 486, 22 L. Ed. 67.

[51] U. S. Comp. St. 1901, p. 3729.

[52] 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

CHAPTER III.

THE DISTRICT COURT (Continued)—CRIMINAL JURISDICTION AND PRACTICE (Continued).

20. Indictment.
21. Same—Form of Indictment.
22. Information.
23. Same—Form of Information.
24. The Defense.
25. The Trial and Its Incidents.

INDICTMENT.

20. Indictment by a grand jury is the most formal mode of criminal procedure, and is required by law in all cases of capital or infamous offenses.

The general rules of criminal procedure and practice in the federal courts are based upon those of the common law, though the rigor and technicality of the common law have been much modified by statute.[1] The fourth, fifth, sixth, seventh, and eighth amendments to the federal Constitution are practically a bill of rights, and show the solicitude of our ancestors to protect the citizen in every way from unjust prosecutions. In fact, these amendments are practically parts of the original Constitution, for the only way in which some of the states were induced to adopt the Constitution in their state conventions was the assurance of its advocates that it should at once be amended by these additions.

The fifth amendment of the Constitution provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

[1] Howard v. U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

in time of war or public danger. This renders an indictment necessary in all cases of capital or infamous offenses. The question, what constitutes an infamous offense was long unsettled, but recent decisions of the Supreme Court have laid down as the test the punishment which can be inflicted. Any offense which may be punishable by confinement for a term of years, either with or without hard labor, is an infamous offense, in the sense of this provision of the Constitution. The test is not the punishment that is actually inflicted in the special case, but the punishment that might be inflicted on the crime charged in the indictment, whether that punishment, as a matter of fact, is inflicted in the special case or not; and the Supreme Court in these cases has repudiated the test of infamous offenses based upon the question of its effect on the prisoner in regard to his competency as a witness thereafter, and applies simply the test as to the character of the punishment.[2] The question whether a given act is a felony or not does not affect the question whether the offense is infamous. If the punishment is as defined above, the offense is infamous, though only a misdemeanor; and, if not as defined above, it may not be infamous, though a felony.

Independent of statute, a felony means those offenses punishable by forfeiture of lands or goods with capital or other punishment superadded.[3]

Under section 1021 of the Revised Statutes,[4] no indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. It is not, however, necessary for the indictment to show upon its face that it was found by twelve grand jurors.[5]

[2] Ex parte WILSON, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409.

[3] Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

[4] 1 U. S. Comp. St. 1901, p. 719.

[5] U. S. v. Laws, 2 Low. 115, Fed. Cas. No. 15,579; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415.

The Court to Try Indictments.

Under section 1037 of the Revised Statutes,[6] whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court; and in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. Under this section the court cannot enter such an order on its own motion, and it can only be done in cases of which the two courts have concurrent jurisdiction.[7] The original indictment need not be sent up in such case, but a certified copy may be used.[8]

Such an order may be entered at any time before final judgment.[9]

The court to which an indictment has been remitted may send it back.[10] This power to remit applies only to indictments, not to informations.[11] Under section 1038 of the Revised Statutes,[12] any district court may remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case. This, however, is done only in cases of great importance, for the district judge usually holds the circuit court.[13] Section 1039, Rev. St. U. S.,[14] provides that every

[6] 1 U. S. Comp. St. 1901, p. 723.

[7] U. S. v. Bennett, Fed. Cas. No. 14,571; Campbell v. Kirkpatrick, 5 McLean, 175, Fed. Cas. No. 2,363.

[8] U. S. v. McKee, Fed. Cas. No. 15,687.

[9] U. S. v. Morris, Fed. Cas. No. 15,815; U. S. v. Haynes (C. C.) 26 Fed. 857; Id. (D. C.) 29 Fed. 691; In re Haynes (C. C.) 30 Fed. 767.

[10] U. S. v. Murphy, 3 Wall. 649, 18 L. Ed. 217.

[11] U. S. v. Tiernay (C. C.) 16 Fed. 513.

[12] 1 U. S. Comp. St. 1901, p. 723.

[13] U. S. v. O'Sullivan, Fed. Cas. No. 15,973.

[14] 1 U. S. Comp. St. 1901, p. 723.

indictment of a capital offense presented to a district court, together with recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; thus giving a district court jurisdiction to empanel a grand jury and receive an indictment in a capital offense, though it would not have jurisdiction to try it.

SAME—FORM OF INDICTMENT.

21. An indictment in the federal courts, though defective in matter of form, is sufficient if the necessary facts of time, place, and circumstances are so stated as to enable the accused to concert his defense and protect himself from a second prosecution, and as to enable the court to decide whether it is legally sufficient to support a conviction.

Section 1025, Rev. St. U. S.,[15] provides that no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Under this federal statute of jeofails, indictments in the federal courts are simple and devoid of archaic terms or cumbrous forms. At the same time they must be so definite as to give the accused notice of the crime charged against him, enable him to concert his defense, and enable him also to plead former acquittal or conviction in the event of a second trial for the same offense. The general requisites of an indictment are well defined in the case of U. S. v. Cruikshank[16] as follows: "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right

[15] 1 U. S. Comp. St. 1901, p. 720.

[16] U. S. v. CRUIKSHANK, 92 U. S. 542, 23 L. Ed. 588.

'to be informed of the nature and cause of the accusation.' Amend. 6. In United States v. Mills, 7 Pet. 142 [8 L. Ed. 636], this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in United States v. Cook, 17 Wall. 174 [21 L. Ed. 538], that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. 1 Archb. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." In statutory offenses the language of the statute may be followed, but this does not dispense with the necessity of setting out the specific elements of the offense itself with sufficient definiteness to put the prisoner on his defense, and to enable him to protect himself from a second prosecution.[17] It must charge the time and place, though a blank as to the exact date is not always fatal, and naming the county instead of the town is at least not fatal on a mo-

[17] U. S. v. Fero (D. C.) 18 Fed. 901; U. S. v. Brazeau (C. C.) 78 Fed. 464; Peters v. U. S., 94 Fed. 127, 36 C. C. A. 105; Cochran v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

tion in arrest of judgment.[18] As to offenses on the high seas, it is not necessary to charge the special place where they happened, for the general allegation that they were on the high seas and out of the jurisdiction of any particular state is sufficient.[19]

In setting out a draft contained in a registered letter alleged to have been stolen, a description of it, giving the name of the maker, the payee, the payee's address, and the place where it is payable, with an allegation that further particulars are unknown to the grand jury, is sufficient; the draft having been destroyed.[20] The indictment must give the name, not the mere initials, of the accused; but, if the sound is the same, the fact that the spelling is incorrect does not vitiate it.[21] An indictment must set out a written document in hæc verba, though, as to certain matter made unmailable by the federal statutes, an allegation in the indictment that it is improper to be put upon the records of the court renders it discretionary with the court whether to require such matter to be set out in the indictment, and the exercise of such discretion is not reviewable; nor does a failure to require it to be set out infringe the prisoner's constitutional right to be informed of the nature and cause of the accusation.[22] The indorsement on the indictment of a reference to the statute on which the district attorney supposes it to be based is not a part of the

[18] Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; Id., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; U. S. v. Conrad (C. C.) 59 Fed. 458.

[19] ANDERSEN v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116.

[20] Rosencrans v. U. S., 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708.

[21] U. S. v. Upham (C. C.) 43 Fed. 68; Faust v. U. S., 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224.

[22] U. S. v. Noelke (C. C.) 1 Fed. 426; U. S. v. Watson (D. C.) 17 Fed. 145; Dunlop v. U. S., 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799; Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606.

indictment itself, and the indictment is good if sustainable under some other statute.[23]

Section 5396 of the Revised Statutes [24] makes special provision for an indictment charging perjury, and this special provision is not modified or done away with by section 1025.[25] Whether an indictment on a statute must negative an exception in the statute depends upon the form of the statute itself. If the exception is in the same clause as the offense, so interwoven as to be inseparable, the indictment should negative it; but, if it is in a separate clause, then the exception is matter of defense, and need not be negatived in the indictment.[26] So liberal is the practice under section 1025 that the omission of the usual phrase, "contrary to the statute in such case made and provided, and against the peace and dignity of the United States" is mere matter of form, and does not vitiate the indictment.[27]

Nor is it necessary to use the word "feloniously," when the statute itself does not use it.[28] The recital in the indictment that it was found upon the oaths of the grand jurors, when one of them affirmed, is also a mere matter of form.[29] An indictment need not set out regulations made by any of the departments under statutory authority, nor need they be offered in evidence, for the courts notice them judicially.[30] Charges or allegations in an indictment which are not necessary may be disregarded, but cannot be struck out. There is no such thing as amending an indictment. It is supposed

[23] Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.

[24] 3 U. S. Comp. St. 1901, p. 3655.

[25] Markham v. U. S., 160 U. S. 319, 16 Sup. Ct. 288, 40 L. Ed. 441.

[26] U. S. v. Moore (C. C.) 11 Fed. 248; U. S. v. Nelson (D. C.) 20 Fed. 202; Nelson v. U. S. (C. C.) 30 Fed. 112; Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570.

[27] Frisbie v. U. S., 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

[28] Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

[29] Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

[30] Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415.

to be the act of the grand jury, and it is not for the court to say what charges in it induced them to find it, and what not. An amendment by the court, even in striking out words which could be disregarded as surplusage, makes it no longer an indictment of a grand jury, makes it an absolute nullity, deprives the court of jurisdiction to try it, and entitles the prisoner to be released on habeas corpus.[81]

Each count of an indictment must charge but one distinct offense, but section 1024, Rev. St. U. S.,[82] provides that when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment, in separate counts; and, if two or more indictments are found, in such cases the court may order them to be consolidated.

Although each count must charge a distinct offense, a count for murder does not become liable to the charge of duplicity by reciting that the murder was committed by shooting and drowning.[83] A count may charge as a single offense a series of acts which constitute a single transaction, though these acts may become separate offenses as regards separate provisions,[84] and it may be that two supposed offenses may be merely successive acts in one transaction.[85] A single count may charge one defendant as a principal, and another as accessory, and this does not make it liable to the charge of duplicity.[86]

Under this power of joinder, even separate murders may

[81] Ex parte BAIN, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.

[82] 1 U. S. Comp. St. 1901, p. 720.

[83] ANDERSEN v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116.

[84] U. S. v. Scott (C. C.) 74 Fed. 213.

[85] U. S. v. Fero (D. C.) 18 Fed. 901.

[86] U. S. v. Berry (D. C.) 96 Fed. 842.

be joined in one indictment under separate counts.[37] Felonies and misdemeanors may be joined also, if of the same general class.[38] There is, however, a limit to this power of joinder. In McElroy v. U. S.[39] the Supreme Court held, in a case of indictments against three parties for assault with intent to kill one party, another indictment against the same parties for assault with intent to kill another party, another indictment against the same parties for arson of the dwelling house of one party, and another indictment against three of these parties for arson of the dwelling house of another party, that these could not be consolidated, and these different defendants arraigned together in an omnibus trial for these various offenses.

It is always discretionary with the court to compel the government to elect on which of several indictments or counts it will proceed, and this may be done at any time during the trial; and the court will always do it if convinced that a trial upon too many indictments or counts would embarrass the defendant in his defense.[40]

It is allowable for the different counts to refer to each other.[41] The fact that one count is invalid, because based upon a complaint made on information only, does not invalidate other counts made upon a complaint based on personal knowledge.[42]

[37] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[38] U. S. v. Spintz (C. C.) 18 Fed. 377.

[39] 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355.

[40] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Gardes v. U. S., 87 Fed. 172, 30 C. C. A. 596; Id., 171 U. S. 689, 19 Sup. Ct. 884, 43 L. Ed. 1179.

[41] Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; U. S. v. Peters (C. C.) 87 Fed. 984; Peters v. U. S., 94 Fed. 127, 36 C. C. A. 105.

[42] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577.

INFORMATION.

22. Information by the district attorney is a method of criminal procedure less formal than the indictment, and an information lies in any cases not capital or infamous.

SAME—FORM OF INFORMATION.

23. Information must conform substantially to the rules stated above in relation to indictments.

The requisites of an indictment apply to informations. An information lies in any cases not capital or infamous, as above defined. Section 1022, Rev. St. U. S.,[43] which provides that all crimes and offenses committed against the provisions of chapter 7, tit. "Crimes" (this chapter defining offenses against the elective franchise), which are not infamous, may be prosecuted by indictment or by information filed by a district attorney, must be construed in conjunction with the fifth amendment of the Constitution, and was not intended to mean that only those special offenses could be proceeded against by information.[44] An information must be by leave of court, and the judge may give the accused an opportunity to show cause against its filing.[45] A complaint, to justify an information, must show personal knowledge and probable cause.[46]

[43] 1 U. S. Comp. St. 1901, p. 720.

[44] Ex parte WILSON, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

[45] U. S. v. Smith (C. C.) 40 Fed. 755.

[46] Johnston v. U. S., 87 Fed. 187, 30 C. C. A. 612; U. S. v. Tureaud (C. C.) 20 Fed. 621.

THE DEFENSE.

24. The method of defense is substantially the same as in the state courts, i. e. by motions to quash, demurrers, or pleas, dilatory or peremptory, according to the character of the defense.

Prisoner Entitled to Copy of Indictment and Lists of Jurors and Witnesses Before Trial.

Section 1033 of the Revised Statutes[47] provides that, when any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial. This requirement, as is obvious from its language, applies only to capital offenses. The prisoner must ask for it before pleading or the commencement of the trial, or he will be held to have waived it.[48] If a witness is offered whose name is not on the list furnished, the defendant must object at once, and not wait until the witness has been examined in chief, as such action also will be a waiver.[49]

General Defenses.

The method of defense in criminal cases in the federal courts is practically the same that prevails in the courts of the different states, and the general rules of criminal proce-

[47] 1 U. S. Comp. St. 1901, p. 722.

[48] U. S. v. Cornell, Fed. Cas. No. 14,868; U. S. v. Curtis, Fed. Cas. No. 14,905.

[49] Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. See, in general, Van Duzee v. U. S. (D. C.) 41 Fed. 571; U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

dure are applicable. Dilatory defenses must be made first and promptly. Defenses of this sort are usually made either by motion to quash or by plea in abatement. A motion to quash may be made even when dependent on facts not appearing on the face of the record, and evidence may be adduced on the hearing of the motion. In fact, the mere affidavit to a written motion to quash, setting out facts not admitted, and accompanied by no evidence, is not sufficient proof to sustain it. For instance, a motion to quash an indictment on the ground that negroes were improperly excluded from the jury was held to have been properly denied when the only proof of the fact alleged was the affidavit to the written motion.[50] A motion to quash is addressed to the discretion of the court, and therefore the action of the court upon it is not usually a ground of error.[51] An exception to the make-up of a grand jury may be made by a plea in abatement or by motion to quash, and, if it depends upon facts not shown by the record, evidence is admissible in support of it, but it must be made before pleading in bar.[52] A plea in abatement is also the proper way to raise questions of this character dependent on outside facts, but any objection to the composition of a grand jury must be offered at the earliest opportunity, and the plea in abatement is too late, if the prisoner had any earlier opportunity in court to question the manner in which the grand jury was formed.[53]

A plea in abatement is waived by pleading in bar.[54]

Defenses of law going to the substance are raised by demurrer, but under section 1025, heretofore discussed, special demurrers to mere matters of form are practically super-

[50] Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082.

[51] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

[52] Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

[53] Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624.

[54] U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857.

seded.[55] If a demurrer is overruled, the proper judgment is respondeat ouster.[56]

After dilatory defenses are disposed of, and the prisoner is arraigned, section 1032, Rev. St. U. S., [57] provides that when any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto, and when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. It has been held that this section applies to informations as well as indictments.[58]

The record in a criminal case must show both an arraignment and a plea; otherwise there is no issue for the jury to try, and a verdict and judgment following would be fatally defective.[59] Nearly all defenses going to the merits may be made under a plea of not guilty, but there is at least one which, in its very nature, would have to be pleaded specially. Under amendment 5 of the Constitution, it is provided that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. A defense of once in jeopardy, therefore, could hardly be proved under a plea of not guilty, for the prisoner might be actually guilty, and yet entitled to set up this defense. In some cases, in fact, such a plea might be interposed in conjunction with a plea of not guilty without its being inconsistent. For instance, in the case of Thompson v. U. S.,[60] the judge discovered during the trial of the

[55] U. S. v. Kilpatrick (D. C.) 16 Fed. 765.

[56] Section 1026, Rev. St. U. S. [1 U. S. Comp. St. 1901, p. 720].

[57] 1 U. S. Comp. St. 1901, p. 722.

[58] U. S. v. Borger (C. C.) 7 Fed. 193; In re Smith (C. C.) 13 Fed. 25.

[59] Shelp v. U. S., 81 Fed. 694, 26 C. C. A. 570; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

[60] 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146.

case that one of the members of the jury had been on the grand jury which found the indictment. He thereupon, against the prisoner's objection, discharged the jury and continued the case over for a new trial. On the second trial the prisoner pleaded that the proceedings on the first trial entitled him to raise the defense of once in jeopardy. The Supreme Court held that this plea was not inconsistent with the plea of not guilty, under the circumstances of that special case; but it also held that the plea was not sustainable on the facts, in view of the power of federal courts to discharge juries for facts developed during the trial.

Plea of Former Jeopardy.

The fifth amendment to the Constitution provides that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. This constitutional provision has been the subject of some interesting decisions in the federal courts. The fact that a failure to testify in certain cases before Congress is punishable as a contempt does not make a statute void which also punishes it as a misdemeanor, on the ground of being twice in jeopardy, for the proceedings are entirely different in nature.[61] On the other hand, where a law authorizes a procedure in rem against property for violation of customs laws, and also a direct criminal proceeding against the owner of the property, the acquittal of the owner is a bar to a subsequent proceeding against the property.[62] The provision does not invalidate a law authorizing the infliction of a severer punishment for a second offense.[63] A party who appeals from a criminal decision against him, and secures its reversal, cannot on the new trial plead the former erroneous trial as placing him in jeopardy.[64] Where a party is in-

[61] In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154.

[62] Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684.

[63] Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301.

[64] Ball v. U. S., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300; Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711.

dicted for murder on an indictment which, if objected to, would be fatally defective, and goes to trial on the merits, without excepting to the indictment, and is acquitted, he can plead once in jeopardy to a new proceeding by the government on a correct indictment.[65] Under the power of the federal courts, the act of a court in discharging a jury after finding that one of the jury had been on the grand jury that found the indictment—the discharge of the jury being against the protest of the prisoner—does not violate this provision, and the prisoner can be tried a second time.[66] Parol evidence is always admissible, and sometimes necessary, to prove the facts which are the basis of this plea.[67]

THE TRIAL AND ITS INCIDENTS.

25. (a) EVIDENCE—The accused is entitled to be confronted with adverse witnesses, to compulsory process for his own, and to testify in his own behalf; but his failure to testify cannot be the subject of unfavorable presumptions or comments.

(b) INSTRUCTIONS AND EXCEPTIONS THERETO—Instructions from the court propound the law to the jury, and should be followed, though a verdict of acquittal in disregard of the principles laid down will stand. Errors in them prejudicial to the accused may be availed of by bill of exceptions.

(c) VERDICT AND SENTENCE—The proper method of setting aside a verdict and preventing sentence is by motion for new trial if the errors complained of are not of record, or motion in arrest of judgment if they are of record.

Evidence.

The sixth amendment to the Constitution entitles the accused to be confronted with the witnesses against him, and

[65] Ball v. U. S., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300.
[66] THOMPSON v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146.
[67] Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

to have compulsory process for obtaining witnesses in his favor. Under this provision, section 878, Rev. St. U. S.,[68] provides that whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses—the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

This privilege of the prisoner to be confronted with the witnesses has been jealously guarded by the courts in criminal cases. For instance, in a proceeding against the receiver of stolen stamps, the record of the conviction of the thief was held not admissible in evidence against the receiver of the stamps for the purpose of showing that the ownership of the stamps was in the United States, as such record would have deprived the prisoner of the right of confronting witnesses on an essential element of the offense.[69] For the same reason, the testimony of one of the government's witnesses who had gone before the commissioner at the preliminary hearing could not be proved against the prisoner; it appearing that the witness had escaped, and that the defendant had not in any way participated in or connived at his escape.[70] If, however, the prisoner himself is responsible for the witness' absence, the testimony could be proved against him.[71]

[68] 1 U. S. Comp. St. 1901, p. 668.
[69] Kirby v. U. S., 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 890.
[70] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.
[71] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244.

The constitutional provision, however, does not apply to witnesses introduced by the government in rebuttal, as, from the very nature of the case, it could not have been intended to apply to such a case.[72] The provision does not apply to a civil suit for the value of property forfeited under a federal law, as such procedure is not in its nature a criminal prosecution.[73] This provision entitling the accused to be confronted with the witnesses does not forbid the reception in evidence of dying declarations, if they measure up to the requirements prescribed by the common law, and they are admissible both for and against the accused.[74] Another constitutional provision which is rigidly guarded is contained in the fifth amendment of the Constitution, which provides that no person shall be compelled in any criminal case to be a witness against himself. Under this the courts have held that the confessions of the accused cannot be used against him unless it is clear that they are entirely voluntary, and that they have been made without any inducement held out to the prisoner, or any improper influences brought to bear upon him, though the mere fact that they are made while in custody is not in itself sufficient to prevent them from being voluntary.[75]

Under the decisions of the Supreme Court, there is a strong presumption of innocence, and the prisoner must be guilty beyond a reasonable doubt. Even the ordinary presumption of sanity does not negative this, but the burden is on the government to prove the crime beyond a reasonable doubt, and the capacity of the prisoner to commit crime is part of the elements of the crime.[76] The general good charac-

[72] Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[73] U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777.

[74] Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; Carver v. U. S., 160 U. S. 553, 16 Sup. Ct. 388, 40 L. Ed. 532; Id., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602.

[75] Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

[76] Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

ter of the prisoner may be considered as itself sufficient to raise a reasonable doubt, even though the rest of the evidence, taken alone, would not have left room for such a doubt.[77] The flight of the prisoner, or concealment of suspicious circumstances, is valuable as part of the chain of evidence, but is not sufficient alone to raise a legal presumption of guilt.[78] Where several are indicted jointly for a conspiracy or a joint crime, the acts and statements of the different defendants are evidence against each other, up to the point when the offense is consummated, or the idea of committing the offense abandoned, but not thereafter.[79]

Prisoner May, but Need Not, Testify.

By the act of March 16, 1878,[80] it is provided that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. The court is extremely careful, under this statute, to forbid any comments whatever upon the failure of the accused to testify. In fact, in one case the Supreme Court said that all reference to his failure to testify must be rigidly excluded.[81] When the prisoner does take the witness stand,

[77] Edgington v. U. S., 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467.

[78] Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474; Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; Starr v. U. S., 164 U. S. 627, 17 Sup. Ct. 223, 41 L. Ed. 577.

[79] Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; Wiborg v. U. S., 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078

[80] 1 U. S. Comp. St. 1901, p. 660.

[81] WILSON v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650.

his testimony is entitled to be considered fairly; and the judge must not make hostile comments upon the fact that he is the accused, or say to the jury that such fact alone should destroy or seriously impair the weight of his testimony, though it can call the attention of the jury to the fact that the prisoner would have a strong motive to testify in his own interest. How far the court can go in this particular is difficult to define.[82] If a prisoner waives his right of exemption from testifying, and takes the witness stand, he takes it cum onere, and subjects himself to cross-examination, like any other witness.[83]

The fact that a decoy is used to establish the guilt of a prisoner is not sufficient to exclude evidence of such decoy, and the prisoner may be convicted upon it.[84]

The accused must be present during the trial, and this is a right which he cannot waive.[85] This principle, however, applies only to the court of original jurisdiction. When an appellate court affirms the action of the lower court, and enters an order to that effect, it is not necessary for the accused to be present, even though the order of the appellate court names the time and place of execution, as that is not technically a part of the judgment.[86]

The granting or refusing of a continuance is a matter of discretion in the trial court, and not reviewable.[87]

[82] Hicks v. U. S., 150 U. S. 442, 14 Sup. Ct. 144, 37 L. Ed. 1137; Reagan v. U. S., 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709; Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474; Allison v. U. S., 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395.

[83] Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078.

[84] Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. U. S., 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727.

[85] Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262.

[86] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218.

[87] Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Fidelity and Deposit Co. v. Lumber Co., 189 U. S. 135, 23 Sup. Ct. 582, 47 L. Ed. 744.

It is the duty of the court to curb any improper or unfair remarks of counsel during the progress of a criminal trial. For instance, in the case of Hall v. U. S.,[88] the prosecuting attorney, in commenting upon the fact which had come out in reference to the character of the prisoner during the trial—that he had been tried for killing a negro in Mississippi and acquitted—remarked that trials in the state of Mississippi of a white man for killing a negro were farces. The defendant excepted to these remarks, and the Supreme Court held that they were improper, and awarded him a new trial on that ground.

So, in the case of Williams v. U. S.,[89] where the defendant was being tried for accepting bribes to admit Chinese into this country, the prosecuting attorney, in answer to the point made by the defendant that more had been sent back during his tenure of office than before or since, remarked that, no doubt, every Chinese woman who did not pay Williams was sent back. Exception was taken to this statement and overruled, and the Supreme Court granted a new trial on that, among other grounds.

The proper method of taking advantage of such points as this is by a bill of exceptions setting out the necessary facts to show its relevancy and the ruling of the court thereon.[90]

Instructions to the Jury.

In criminal cases the jury should take the law from the court, and should follow its instructions. They are not judges of both law and fact under the federal practice, but, of course, if they disregard the instructions, and bring in a verdict of acquittal in the teeth of the instructions, the government has no remedy. Despite this result, if they choose to disregard their duty, it is none the less their duty to take the law from the court, though in a criminal case the court cannot

[88] 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003.
[89] 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509.
[90] WILSON v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650.

peremptorily instruct the jury to bring in a verdict of guilty.[91] In the federal practice the judge can express his opinion on questions of fact, but in such case he must caution the jury that his opinion is not binding upon them, and that they are sole judges of the fact.[92] He must not, however, comment in an argumentative or passionate way upon the facts in such manner as to prejudice the jury against the prisoner;[93] and it is error in him to comment on the witnesses called to prove the defendant's character, and to tell the jury to disregard their evidence, on the ground that they themselves are lacking in character, for the jury is just as much judge of the credibility of witnesses on the subject of character as on any other subject.[94] The prisoner must be proved guilty beyond a reasonable doubt, and it is for the court to instruct the jury what constitutes a reasonable doubt, though it is difficult to define it as an abstract proposition.[95] If the prisoner wishes the jury to be instructed on any proposition of law, he must ask the instruction of the court. It is not error in the court, if it does not instruct on all propositions of law that may be involved, when it has not been asked to do so.[96] If, however, the legal proposition which the prisoner wishes to be propounded to the jury is covered by another instruction, or by the general charge which the court gives, it is not error in the court to refuse to repeat it.[97]

Error.

The proper method of embodying in the record any errors in the court in reference to the instructions is by a bill of

[91] SPARF v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

[92] Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

[93] Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841.

[94] Smith v. U. S., 161 U. S. 85, 16 Sup. Ct. 483, 40 L. Ed. 626.

[95] Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[96] Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[97] Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; White v. U. S., 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; Humes v. U. S., 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011.

exceptions. In fact, this is probably the most common use of a bill of exceptions. Section 953 of the Revised Statutes,[98] as last amended, provides that a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions, and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may, in his discretion, grant a new trial to the party moving therefor.

An exception to an instruction or to a charge must point out definitely the part excepted to, as it is not the duty of the court to search through a long charge or instruction for error.[99] If the defendant asks a number of instructions which are refused, a general exception to their refusal fails if any one of them is wrong. He must specify the separate

[98] 1 U. S. Comp. St. 1901, p. 696.

[99] Edgington v. U. S., 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467.

errors in connection with each instruction.[100] A bill of exceptions to the refusal of the court to grant the instructions asked by the defendant should set out the instructions actually given, for, as the presumptions are in favor of the correctness of proceedings in the lower court, the appellate court might otherwise presume that the instructions actually given covered the points embodied in the instructions of the accused.[101] Of course, the instructions must be incorporated in the bill of exceptions so as to enable the appellate court to see wherein there was error.[102] It is allowable in federal practice to join all of the exceptions in one bill, but this does not dispense with the necessity of taking separate exceptions to the separate rulings and pointing out the separate errors relied on.[103]

The Verdict.

It is allowable for the judge to recall the jury and give them further instructions, and even to impress on them the importance of coming to an agreement, and of making mutual concessions for that purpose.[104] When there is more than one count in an indictment, the jury may agree to bring in a verdict on one or more counts, though they disagree as to others, and where there are separate defendants they may acquit some and convict others; and, even when the case goes to the appellate court, the court may set aside the verdict as to one count, and let it stand as to others.[105] A verdict expressly finding the defendant guilty on some counts,

[100] Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

[101] Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

[102] Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

[103] LEES v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

[104] Allis v. U. S., 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

[105] St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; Bucklin v. U. S., 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304, 305; Ballew v. U. S., 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388; Selvester v. U. S., 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029.

and not mentioning the other counts at all, is equivalent to an acquittal on the other counts.[106] A general verdict of guilty is valid if any count is good.[107] Section 1035, Rev. St. U. S.,[108] provides that in all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense. Under this section it is proper for the court to instruct the jury that it should not find the prisoner guilty of a lesser offense where there is no evidence whatever to show that the lesser offense was actually committed,[109] but, if there is any evidence at all that a lesser offense was committed, the court must not take this question from the jury, and must not instruct them against finding a verdict of the lesser offense.[110] The jury may, by consent of parties and in the presence of the defendant, bring in a sealed verdict.[111]

New Trials.

A motion for a new trial is addressed to the discretion of the federal court, and is not ordinarily reviewable, though, where the acts to which exceptions have been taken can only be availed of by granting the accused a new trial, and those acts are properly excepted to, the mere fact that the question comes up in the form of a motion for a new trial will not prevent the appellate court from relieving the accused against the errors so committed.[112]

[106] Jolly v. U. S., 170 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085.

[107] Friedenstein v. U. S., 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[108] 1 U. S. Comp. St. 1901, p. 723.

[109] SPARF v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

[110] Stevenson v. U. S., 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980.

[111] Pounds v. U. S., 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62.

[112] Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

Motions in Arrest of Judgment.

This motion only lies for matter apparent on the record, or for the lack of matter that ought to be apparent on the record. For mere matters of form, the court will not sustain such a motion—even for points which in some cases might have been good on demurrer.[113]

Judgment and Sentence.

The judgment should be definite, and show that it is based upon the verdict and the criminal statute under which the prosecution is instituted, though any defect in this particular may be supplied by the full record, if that itself is complete, showing an indictment, arraignment, plea, trial, and conviction.[114] It must conform strictly to the statute, and, if it goes on and adds a character of imprisonment not authorized by law, it is void—as, for example, where a judgment sentenced a person accused of crime to imprisonment for one year and the payment of a fine, and then illegally added that the imprisonment should take place in a state penitentiary, the judgment was void, and the prisoner was released on habeas corpus.[115] When a writ of error is taken to a judgment, it is merely stayed, not vacated.[116] Where a prisoner is convicted on several offenses, the court can impose a single sentence, making it greater than it would have been on any one.[117] The recent act of January 15, 1897,[118] permits the jury in certain capital cases to qualify their verdict by adding thereto, "Without capital punishment," and in such case the

[113] U. S. v. Barnhart (U. S.) 17 Fed. 579; Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

[114] White v. U. S., 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[115] In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149.

[116] Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218.

[117] In re De Bara, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. Ed. 207.

[118] 29 Stat. 487, c. 29 [3 U. S. Comp. St. 1901, p. 3620].

court cannot sentence to death. This statute has been construed to give the jury power to add this qualifying clause in any capital case, even when there is no evidence whatever of palliating circumstances, and the court must not take this right away from them by instructions.[119]

[119] Winston v. U. S., 172 U. S. 303, 19 Sup. Ct. 212, 43 L. Ed. 456. See, also, on this same statute, MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

CHAPTER IV.

THE DISTRICT COURT (Continued)—CRIMINAL JURISDICTION (Continued)—MISCELLANEOUS JURISDICTION.

26. Piracy.
27. Penalties, Forfeitures, and Seizures.
28. Same—Nature and Form.
29. Miscellaneous Jurisdiction.
30. Admiralty.
31. Same—Nature and Form.
32. Further Miscellaneous Jurisdiction.
33. Concerning Suits by and against National Banks.

PIRACY.

26. The second clause of section 563 of the Revised Statutes[1] gives the district court jurisdiction of piracy cases when no circuit court is held in such district.

This applied to certain districts where the district courts had circuit court powers, but by act of February 6, 1889,[2] the circuit court jurisdiction of these courts was abolished, which has the effect of superseding the jurisdiction of the district court under the above clause.

PENALTIES, FORFEITURES, AND SEIZURES.

27. The district court has jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States, and of all seizures on land and on waters not within the admiralty and maritime jurisdiction. This jurisdiction is not exclusive; nor, on the other hand, is it to be construed away by statutes giving the circuit courts certain jurisdiction in these matters.

[1] 1 U. S. Comp. St. 1901, p. 455.
[2] 1 U. S. Comp. St. 1901, p. 492.

The third clause of section 563 gives the district court jurisdiction "of all suits for penalties and forfeitures incurred under any law of the United States," and the eighth clause of the same section gives it jurisdiction of all seizures on land and on waters not within admiralty and maritime jurisdiction. The jurisdiction of the district court under this general statute over forfeitures is not to be construed away by statutes which merely give the circuit courts jurisdiction over some forfeiture cases, but do not in terms take away the jurisdiction of the district court. For instance, it has been held that the district court has jurisdiction of suits for penalties under the alien contract law,[3] even though that law provides that such penalties may be recoverable "as debts of like amount are now recovered in the circuit courts of the United States." This latter clause applies simply to the form of the action.[4] Nor will mere general expressions in statutes take away the exclusive jurisdiction of the district courts. For instance, the act of March 3, 1875,* giving the circuit courts jurisdiction of all civil suits between certain parties, and involving a certain amount, was not intended to give the circuit court jurisdiction of suits for penalties and forfeitures, even though in one sense they are civil suits.[5]

SAME—NATURE AND FORM.

28. These proceedings are against the offender or against the property or both. Suits for penalties are in the form of an ordinary common-law action on a money demand. Suits for forfeitures against the property are in the form of an information in rem. They partake both of a civil and a criminal nature, possessing certain attributes of each.

[3] 1 U. S. Comp. St. 1901, p. 1290.

[4] LEES v. UNITED STATES, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

* 1 U. S. Comp. St. 1901, p. 508.

[5] U. S. v. MOONEY (C. C.) 11 Fed. 476; Id., 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550; Helwig v. U. S., 188 U. S. 605, 23 Sup. Ct. 427, 47 L. Ed. 614.

Penalties and forfeitures are common all through the federal statutes, in connection with the navigation laws, the customs laws, the internal revenue laws, etc. They usually prescribe a penalty against the offender, and, where the offense is sufficiently grave, a forfeiture of the property engaged in the violation of law. In some of the statutes, the property itself is treated as the offender, independent of the question of ownership. In such case the procedure against the property as an offending thing is absolutely independent of the procedure against the owner. In fact, it is possible for the owner to be acquitted and the property condemned in such case. Other proceedings make the act of the owner and the forfeiture of the property so interwoven that the one is an incident of the other. The special statute must be referred to in each case, in order to ascertain whether the case falls under one or the other of these classes. It has been held that under the first of these two clauses "suits for penalties and forfeitures" mean civil actions.[6] Under section 732 of the Revised Statutes [7] all pecuniary penalties and forfeitures may be sued for and recovered, either in the district where they accrue, or in the district where the offender is found; and, under section 734,[8] proceedings on seizures, for forfeiture under any law of the United States, made on the high seas, may be prosecuted in any district into which the property so seized is brought, and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

Suits for penalties are in the form of an ordinary common-law action on a money demand. Suits for forfeitures against the property are in the form of an information in rem. These procedures partake both of a civil and a criminal nature.

[6] The Little Ann, Fed. Cas. No. 8,397; U. S. v. Mann, Fed. Cas. No. 15,718.

[7] 1 U. S. Comp. St. 1901, p. 585.

[8] 1 U. S. Comp. St. 1901, p. 586.

Where no fine or imprisonment is imposed,[9] they are civil in their form—so much so, indeed, that the government has an appeal. But they are so far criminal in their nature that a defendant cannot be required to give evidence against himself.[10] On the other hand, in a civil action sounding in dollars and cents, the evidence can be taken by deposition, and the constitutional provision in reference to confronting the accused with witnesses does not prevent its being so taken.[11] Where the act of the owner is so connected with the illegal use of the property as to make it an essential element of the offense, his acquittal would bar a procedure in rem against the property.[12] These cases are triable by a jury, but the parties may waive a jury.[13] Where the violation of law by the thing itself is independent of the act of the owner, the procedure against the thing and the prosecution of the owner are entirely distinct, and a forfeiture of the thing may be decreed without a conviction of the owner.[14] The procedure, in case of a libel of information, which is by nature largely an admiralty proceeding, or at least based on the practice of the admiralty court, is required by admiralty rule 22 of the Supreme Court to state the place of seizure, whether on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and give notice to all persons concerned

[9] Friedenstein v. U. S., 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736.
[10] LEES v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.
[11] U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777.
[12] Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684.
[13] Henderson's Distilled Spirits, 14 Wall. 44, 20 L. Ed. 815.
[14] U. S. v. The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.

in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed. By section 923 of the Revised Statutes,[15] in such cases fourteen days' notice of the seizure and libel shall be given by causing the substance of the libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial, and proclamation shall be made in such manner as the court shall direct; and, if no person appears and claims the property or bonds it, the court can proceed to hear and determine the cause according to law.

By section 1047 of the United States Revised Statutes,[16] suits for penalties or forfeitures are limited to five years, except where there are special provisions in special cases.

It is important to bear in mind the well-established provision of criminal law that statutory forfeitures, unlike common-law forfeitures, take effect, not from the date of sentence, but from the commission of the offense, even as against an innocent purchaser.[17]

Powers of Secretary of Treasury.

Under sections 5293 and 5294 of the Revised Statutes,[18] the Secretary of the Treasury is given a large discretion in remitting penalties incurred where no intent to violate the law seems to exist; and it is but just to the department of the treasury to say that, in the exercise of this discretion, great generosity and mercy have been shown, as against parties innocent of any intent to violate the law. This power may be exercised by the Secretary of the Treasury even in suits brought by informers before actual trial and judgment, and these sections giving him

[15] 1 U. S. Comp. St. 1901, p. 686.

[16] 1 U. S. Comp. St. 1901, p. 727.

[17] Henderson's Distilled Spirits, 14 Wall. 44, 20 L. Ed. 815.

[18] 3 U. S. Comp. St. 1901, pp. 3605–3607. Some of these powers are now vested in the Department of Commerce and Labor. U. S. Comp. St. Supp. 1903, p. 48.

this power are not unconstitutional, as violating the pardoning power of the President.[19]

MISCELLANEOUS JURISDICTION.

29. The district court has jurisdiction in the following miscellaneous cases:

(a) Common-law suits brought by the United States or its officers.

(b) Chancery suits to enforce lien for taxes.

(c) Suits for the recovery of any forfeiture or damages under section 3490.

(d) Causes of action arising under the postal laws.

Common-Law Suits Brought by the United States or Its Officers.

The fourth paragraph of section 563 gives the district court jurisdiction "of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue." An action of debt for penalties in the name of the United States is sustainable under this section, as well as under the preceding.[20] So, also, an action on a postmaster's bond.[21] So, also, an action of trover by a United States marshal for money held by him in that capacity.[22] Suits by receivers of national banks, to realize the assets of the bank and for other purposes, are also sustainable under this section.[23] These suits do not depend either on amount or on the question of citizenship of the parties.[24]

[19] The Laura, 114 U. S. 411, 5 Sup. Ct. 881, 29 L. Ed. 147.

[20] Jacob v. U. S., Fed. Cas. No. 7,157.

[21] Postmaster General v. Early, 12 Wheat. 136, 6 L. Ed. 577.

[22] Henry v. Sowles (D. C.) 28 Fed. 481.

[23] Platt v. Beach, Fed. Cas. No. 11,215; Frelinghuysen v. Baldwin (U. S.) 12 Fed. 395; Lake Nat. Bank v. Bank, 78 Fed. 517, 24 C. C. A. 195; Thompson v. Poole (C. C.) 70 Fed. 725; Auten v. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920.

[24] U. S. v. SAYWARD, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508; Farmers' Nat. Bank v. McElhinney (D. C.) 42 Fed. 801.

Chancery Suits to Enforce Lien for Taxes.

This is the fifth clause of section 563. Section 3207 of the Revised Statutes [25] gives the right to file a bill in chancery to enforce tax liens on real estate; and section 3213 [26] gives a right of action to the United States in any proper form of action or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which a fine or forfeiture may have been incurred, for the recovery of forfeitures under the tax laws connected with the internal revenue; and the same section gives a right of action for taxes in the district where the liability to the tax is incurred, or where the party who owes the tax resides at the commencement of the action.[27]

Suits for the Recovery of Any Forfeiture or Damages under Section 3490.

This constitutes the sixth clause of section 563. Section 3490 referred to under this clause [28] prescribes a forfeiture for any of the acts prohibited by section 5438, and section 5438 [29] relates to obtaining money from the government in various fraudulent ways. Suits under this provision, therefore, though civil in form, are criminal in their nature.[30]

Causes of Action Arising under the Postal Laws.

This constitutes the seventh clause of section 563.

[25] 2 U. S. Comp. St. 1901, p. 2081.

[26] 2 U. S. Comp. St. 1901, p. 2083.

[27] U. S. v. Mackoy, 2 Dill. 299, Fed. Cas. No. 15,696; U. S. v. Rindskopf, 8 Biss. 507, Fed. Cas. No. 16,166.

[28] 2 U. S. Comp. St. 1901, p. 2328.

[29] 3 U. S. Comp. St. 1901, p. 3674.

[30] U. S. v. Shapleigh, 54 Fed. 126, 4 C. C. A. 237.

ADMIRALTY.

30. Jurisdiction in matters of admiralty and maritime law is vested in the district court, and this jurisdiction is made exclusive, except where expressly specified to the contrary. This is an important class of jurisdiction of the district courts.

SAME—NATURE AND FORM.

31. The admiralty procedure is in rem or in personam, and extends to matters in contract and in tort coming under the admiralty and maritime law. The practice is largely governed by a set of rules prescribed by the Supreme Court for the purpose.

The eighth clause of section 563 gives the court jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and of all seizures on land and on waters not within admiralty and maritime jurisdiction, and the jurisdiction of the district court over admiralty causes is made exclusive except where expressly specified to the contrary. This clause also gives the district court exclusive jurisdiction of prizes, except as named in the sixth paragraph of section 629.

The admiralty and maritime jurisdiction of the district courts —at least of those district courts on the seacoast or important navigable waters—is probably its most important class of jurisdiction. The procedure in admiralty is sui generis, consisting of actions in rem and also actions in personam. Those in rem are against the vessel or thing itself. Those in personam are ordinary civil suits on the admiralty side of the court against individuals for admiralty causes of action.

Cases of admiralty cognizance are either in contract or in tort. Those in contract depend upon the character of the cause of action, those being of admiralty cognizance which are

marine in their nature. Those in tort depend upon the locality, admiralty having jurisdiction of such actions where they arise, and become consummate on navigable waters within the jurisdiction of the admiralty courts. Illustrations of admiralty causes of action in contract are suits against vessels for supplies and repairs, suits under charter parties, and suits on bills of lading; and illustrations of actions of tort in the admiralty are collisions between vessels, and personal injuries inflicted by negligence on navigable waters. The pleading which sets out the cause of action is called a libel, and the defense is made by answer or exception. In an action in rem, the property itself is seized, and, if not bonded, the libelant has a decree of sale of the property entered by the court, and it is sold by the marshal, and the proceeds applied to pay the claims asserted against it. The procedure and practice in the admiralty courts are regulated by the rules in admiralty prescribed by the Supreme Court for the government of admiralty causes. They provide a simple and excellent system of pleading, by which causes are quickly matured, and substantial justice administered.

Most of these admiralty causes of action are of a nature that gives the common-law courts also jurisdiction; that is, jurisdiction over the cause of action, but not jurisdiction over the procedure. For instance, in a case of collision between two vessels, the injured party can proceed by a libel in rem against the other vessel, and the district court alone has jurisdiction of such a pleading.[31] But on the other hand, as a collision is a tort at common law, if due to negligence, the injured party can bring an ordinary action of tort in a common-law court, or, if the citizenship and amount are requisite, he can bring an ordinary action of tort in the circuit court of the United States on its common-law side.[32]

[31] The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

[32] The jurisdiction of the admiralty courts is so extensive that it is impossible in this treatise to discuss it. Reference is made to the author's treatise on Admiralty, published in the year 1901.

FURTHER MISCELLANEOUS JURISDICTION.

32. The district court has further miscellaneous jurisdiction including the following matters:

(a) Prize Causes.

(b) Suits for Drawback of Duties.

(c) Suits under the Civil Rights Amendments and Statutes.

(d) Suits under Immigration Laws.

CONCERNING SUITS BY AND AGAINST NATIONAL BANKS.

33. The former jurisdiction of the district court in these matters is now practically abolished.

Prize Causes.

Under the eighth and ninth clauses, the district court has jurisdiction of these causes also. The procedure on prize causes is the admiralty procedure, even though it may be taken in the circuit court.[33]

Suits for Drawback of Duties.

Jurisdiction of these suits is conferrred on the district court by the tenth clause of section 563.[34]

Suits under the Civil Rights Amendments and Statutes.

These are conferred on the district court by sections 11, 12, 13, and 14 of section 563. These acts have been the subject of some interesting decisions by the Supreme Court. It has been held that the exclusion of colored men from juries is a violation of these acts, and gives a colored man who is being proceeded against a good ground of exception.[35] The mere

[33] Coffey v. U. S., 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681; Id., 117 U. S. 233, 6 Sup. Ct. 717, 29 L. Ed. 890.

[34] See, on this subject, sections 3038-3040, 2 U. S. Comp. St. 1901, p. 1997.

[35] Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

fact, however, of separating the races, is not a violation of this act, provided equal accommodations are furnished to both. This applies to their separation in public schools or on public conveyances.[36] And it has also been held that a statute which does not in terms discriminate against the colored race or deprive them of the right to vote is not void on that account where that result is merely incidental, and where it does not appear that there is any purpose in the administration of the law to discriminate against them.[37]

Former Jurisdiction in Suits by and against National Banks. Now Abolished.

The fifteenth clause of section 563 gives the district court jurisdiction of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held. Until the act of July 12, 1882, the district court had jurisdiction of suits by or against national banks, regardless of either the question of citizenship or of the amount involved;[38] but the act of July 12, 1882,[39] which greatly changed the original national banking law, contained a proviso in section 4 that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun. This was fol-

[36] Davenport v. Cloverport (D. C.) 72 Fed. 689; Cumming v. Board, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

[37] Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012. See, in general, Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835.

[38] Kennedy v. Gibson, 8 Wall. 498, 19 L. Ed. 476.

[39] 22 Stat. 162, c. 290, 3 U. S. Comp. St. 1901, p. 3457.

lowed up by the act of March 3, 1887, as amended August 13, 1888, the fourth section of which provides: "All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." [40] The effect of these two acts is practically to supersede the grant of jurisdiction to the district courts under the fifteenth clause of section 563. Suits between a national bank and a citizen of its own state can no longer be brought in the federal courts, unless there is some other ground of jurisdiction involved in the suit, such as the existence of a federal question.[41] Of course, if the court would have jurisdiction of the cause of action provided the national bank was a state bank, it would still have jurisdiction, but these cases would go into the circuit court on the ground of diversity of citizenship or the existence of a federal question; these grounds being discussed in another connection.[42]

Suits by Aliens for Tort, and Suits against Consuls or Vice Consuls.

Jurisdiction of these cases is conferred on the district court by the sixteenth and seventeenth clauses of section 563. They are maintainable against a consul under these provisions, even though the consul may be a citizen of the United States appointed as consul by some foreign power.[43]

[40] 1 U. S. Comp. St. 1901, p. 514.

[41] National Bank of Jefferson v. Fore (C. C.) 25 Fed. 209; Union Nat. Bank v. Miller (C. C.) 15 Fed. 703.

[42] Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816.

[43] Baiz, In re, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 822. See,

Suits under Immigration Laws.

Both the district and circuit courts have jurisdiction over all causes, civil and criminal, arising under the immigration acts of March 3, 1891,[44] and the act of March 3, 1903.[45]

in general, Iasigi v. Vande Carr, 166 U. S. 391, 17 Sup. Ct. 595, 41 L. Ed. 1045; Bors v. Preston, 111 U. S. 261, 4 Sup. Ct. 407, 28 L. Ed. 419.

[44] 26 Stat. 1084, c. 551, 1 U. S. Comp. St. 1901, p. 1294.

[45] 32 Stat. 1213, c. 1012, U. S. Comp. St. Supp. 1903, p. 170.

CHAPTER V.

THE DISTRICT COURT (Continued)—BANKRUPTCY.

34. Bankruptcy—Jurisdiction Over.
35. Same—History of the Legislation.
36. Same—Policy of the Legislation.
37. Constitutionality of Bankrupt Legislation.
38. Same—Effect of Federal on State Legislation.
39. The Bankruptcy Courts.
40. Parties—Voluntary Proceedings.
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42. Pleadings.
43. Acts of Bankruptcy—Definition and Enumeration.
44. Same—Transfers to Hinder, Delay, and Defraud Creditors.
45. Same—Illegal Preferences.
46. Same—Suffering Preferences by Legal Process.
47. Same—Assignment as an Act of Bankruptcy.
48. Same—Admission of Insolvency in Writing.
49. Time of Filing Petition.

BANKRUPTCY—JURISDICTION OVER.

34. The district court is the principal tribunal exercising supervision over matters of bankruptcy.

SAME—HISTORY OF THE LEGISLATION.

35. Several United States bankruptcy statutes have been in force at different intervals, varying somewhat in their nature according to the exigencies of the period. The present statute on the subject was put into force by the act of July 1, 1898.*

* U. S. Comp. St. 1901, p. 3418.

SAME—POLICY OF THE LEGISLATION.

36. The general policy of bankruptcy laws is at once the relief of honest but unfortunate debtors, by enabling them to start life anew, relieved of a load of indebtedness which would otherwise crush their future, and again the protection of the bankrupt's creditors, who find a remedy in its provisions for the better enforcement of their claims. The policy of these laws has varied according as they have had most in view the protection of the creditor or the relief of the debtor. The necessity for uniform legislation on this subject vindicates the wisdom of vesting the national government with the power to regulate the question.

Section 563 of the United States Revised Statutes provides that the district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy. This makes the district court the real bankruptcy court, though the circuit court has jurisdiction of various proceedings growing out of the bankruptcy law, as will be seen in the development of the subject.

Article 1 of section 8 of the Constitution conferred power upon Congress, among other things, to establish uniform laws on the subject of bankruptcies throughout the United States. This power was not exercised by Congress until 1800, when the first bankruptcy law was passed. It remained in force but a short time. In 1841 another bankrupt law was passed, which also was repealed very shortly. Soon after the Civil War, and largely in consequence of the financial misfortunes which had been caused by it, the act of March 2, 1867, was passed. This law remained in force for over twenty years, when it, too, was repealed. Then for a period of about twenty years no national bankrupt law was in force, but the act of July 1, 1898, put into force the present statute on the subject.

Bankrupt laws are based upon sound reasons of public policy, and the importance of having uniform laws of this character

throughout the United States was the main reason which induced the authors of the national Constitution to confide that power to Congress instead of the states. By a national bankrupt law the rights of creditors can best be protected against frauds of dishonest debtors and partial state legislation in favor of the resident debtor against the nonresident creditor. On the other hand, a national bankrupt law, as distinguished from a state law, is in the interest of the honest debtor as well, for thereby alone can he obtain a release from all of his debts, since a state statute, which has no extraterritorial jurisdiction, could not discharge him from the claims of nonresident creditors. The proper purposes of a bankruptcy act, therefore, are to protect creditors from fraud, to secure an equal and equitable distribution of a debtor's estate among his creditors, and to relieve honest debtors from the burden of debts which have fallen upon them through misfortune, and which they could never pay. The state itself, as has been well said, has an interest in extending this relief to such debtors, since it is for the good of the state that all of its members should be industrious, and contribute their efforts to building up the general prosperity. Any one who has been so unfortunate as to contract an enormous load of indebtedness, which he recognizes to be beyond his ability to pay, even by the labor of a lifetime, is liable to have his industry paralyzed, and to become a mere drone on society. On the other hand, if he is allowed to turn over all his property as a trust fund to his creditors, and secure a discharge from his indebtedness, he can start life anew, with the feeling that he will reap some benefit from his labor, and will thereby be induced again to become a useful member of the body politic.

The policy of bankrupt laws has varied according as the lawmakers have had most in mind the protection of the creditor or the relief of the debtor. The act of March 2, 1867, with which the older members of the bar are familiar, was mainly a collection law in the interest of the creditor, though it did not entirely lose sight of the interest of the debtor. The present

law was in its inception mainly in the interest of the debtor. The amendment of February 5, 1903,† however, has changed this considerably, and made it more of a collection law, though it still remains as to its distinctive features primarily in the interest of the debtor.

A bankrupt law is in a certain sense a proceeding in rem. It treats the debtor's property as a trust fund, takes charge of it through the machinery of the bankrupt court, and divides it among his creditors.

Nothing can better illustrate the advance in civilization than the contrast between the present and former methods of treating the debtor. The old laws of imprisonment for debt locked up many deserving, talented, and industrious citizens, withdrew them from the general class of producers, and made them a charge upon the community. The horrors of this state of affairs have played too prominent a part, both in history and literature, to require more than a passing reminder. On the other hand, the abolition of imprisonment for debt and the enactment of the bankrupt laws have placed every citizen in a position where he not only can, but probably will, labor for the general weal, as he still has left the motive of acquisition, which is the mainspring of prosperity.

In view of the object of a bankrupt law, the courts have treated such laws, not as special statutory proceedings, to be strictly construed, like attachment laws, but as remedial, and therefore to be liberally construed. On this point Judge Deady has well said in the case of In re Muller:[1] "In the course of the argument counsel have insisted that this is a special proceeding, purely statutory, and that the act must be taken most strictly against the creditor and in favor of the bankrupt. In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially be-

† U. S. Comp. St. Supp. 1903, p. 410.

[1] Fed. Cas. No. 9,912. See, also, Blake, Moffit & Towne v. Valentine (D. C.) 89 Fed. 691.

tween his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass bankrupt laws is one of the express grants of power to the national government, and history teaches that the want of a uniform law on this subject throughout the states was one of the prominent causes which led to the assembling of the constitutional convention, and consequent formation and adoption of the federal Constitution. Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a system, and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as, indeed, should all acts—according to the fair import of its terms, with a view to effect its objects and to promote justice."

CONSTITUTIONALITY OF BANKRUPT LEGISLATION.

37. A national bankrupt law may constitutionally provide for discharges from debts existing at the time of its passage; also for an adjudication without notice to creditors. It may limit the classes to which it applies, and adopt state exemptions, though they vary in the different states, without contravening the constitutional requirement of uniformity.

Although the federal Constitution forbids a state from passing any laws that would impair the obligation of contracts, there is no similar prohibition against congressional action. For this reason a national bankrupt law can accomplish the objects of bankruptcy legislation when a state law could not, for Congress can pass a bankrupt law that would authorize the discharge of the debtor not only from debts incurred subsequent to the passage of the law, but also from debts existing at

the time of its passage.[2] Under its power to pass a bankrupt law, Congress can also prescribe penal offenses for violations of its provisions, but it could not make a penal law ex post facto, so that an act innocent at the time it was committed cannot be made, even by Congress, an offense upon the happening of some subsequent act either of the bankrupt or another.[3] As a bankrupt procedure is in the nature of a proceeding in rem, a bankrupt law is not invalid, as depriving creditors of their property without due process of law, because it fails to provide for notice to them of the adjudication of bankruptcy. Under the voluntary proceeding, as will be seen later on, the debtor, on filing his petition, is adjudged a bankrupt by the court without giving notice to his creditors; but the law requires notice of subsequent proceedings to be given, so that, before any distribution of the property so surrendered by the debtor, the creditors have ample opportunity to prove their claims and litigate any questions in which they are interested. They also have opportunity to contest the right of the bankrupt to a discharge; hence they have their day in court, and the law for that reason is constitutional.[4]

It will be observed that the Constitution, giving Congress the power to enact bankruptcy laws, requires that they shall be uniform. The present act and the act of March 2, 1867, provided that the exemptions allowed by the different state laws should be preserved for the benefit of the bankrupt. As these varied in different states, it was contended under both of these statutes that the law was unconstitutional for lack of uniformity, but the courts have decided that this provision did not destroy its uniformity, as it was uniform in its general provisions and procedure, and the states could best judge of the need of an exemption and the extent of it.[5]

[2] In re Owens, Fed. Cas. No. 10,632; Darling v. Berry (C. C.) 13 Fed. 659.

[3] U. S. v. Fox, 95 U. S. 670, 24 L. Ed. 538.

[4] HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[5] In re Beckerford, Fed. Cas. No. 1,209; Darling v. Berry (C. C.)

Nor does the present act lose its character of uniformity from the fact that it allows individuals to file a voluntary petition, but denies that privilege to a corporation, and the further fact that it limits the right of proceeding in involuntary cases to a certain class of corporations, for the law is still uniform as to the classes affected by it, and it is within the discretion of Congress to regulate the parties to whom such a law shall apply. The original bankruptcy legislation of England applied only to traders, and the earlier bankruptcy legislation of this country was limited in the same way. There are not the same reasons for giving a corporation a discharge from its debts that exist in the case of an individual. The ordinary procedure for winding up corporations is usually adequate, and, as to them, the reason of state policy which requires the debtor to be encouraged by a discharge, in order to induce him to continue his labors, does not apply. Hence the only reason for applying a bankrupt law to a corporation is to secure an equitable distribution of its assets among its creditors, and that can ordinarily be accomplished in other ways. Therefore Congress can, in its discretion, discriminate between corporations and individuals, and also as among corporations themselves, in deciding whether to make a bankrupt law apply.[6]

SAME—EFFECT OF FEDERAL ON STATE LEGISLATION.

38. The national bankruptcy laws do not invalidate any state laws, but only cause them to become inoperative while the federal law remains in force.

Validity of State Insolvent Laws, and Effect on Such Laws of National Bankrupt Legislation.

In the absence of any national bankrupt legislation, there is no reason why a state cannot pass laws in the nature of local

13 Fed. 659; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[6] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210;

insolvent laws, intended to secure an equitable distribution of a debtor's estate among his creditors, and to relieve a debtor of an unbearable load of debt; but, from their nature, these local laws can but partially accomplish their object. In the first place, the state cannot make them applicable to debts existing at the time of their passage, for the constitutional provision against impairing the obligation of contracts stands in the path. Nor can a state make such a law binding on parties living beyond its jurisdiction, as the power of a state does not extend beyond its own territory, and hence it cannot provide for giving the notice necessary to bind nonresidents. Such laws, however, are binding upon such nonresidents as voluntarily appear in the state court, prove their claim, and participate in the proceeding, for it is a mere question of notice, and by so appearing they submit themselves to the jurisdiction of the state court.[7]

When such state laws are in existence, and a national bankrupt law is passed, it does not have the effect of completely nullifying the state law. It merely leaves it in a state of suspended animation, so that the instant the bankrupt law is repealed the state law comes again into effect, without any additional legislation by the state. On the same theory, if a state enacts a local law while a bankrupt law is in existence, that law is not absolutely null and void; it merely remains in suspense until the national bankrupt law is repealed, and then it takes immediate effect.[8]

HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[7] Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; GILMAN v. LOCKWOOD, 4 Wall. 409, 18 L. Ed. 432; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773.

[8] Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; In re John A. Etheridge Furniture Co. (D. C.) 92 Fed. 329.

THE BANKRUPTCY COURTS.

39. The courts of bankruptcy as designated by the statute, in the preliminary definitions, are the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska, and these tribunals are invested with such powers as will enable them to exercise control in matters of bankruptcy.

The question of the proper forum, as to locality, is fixed by the terms of the statute, together with certain rules of the Supreme Court promulgated under the authority of the statute.

The second section of the bankrupt act provides that "the courts of bankruptcy, as hereinbefore defined, namely, the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms, as they are now or may be hereafter held, to do the various things incidental to the administration of the bankruptcy law."

The Proper Forum as to Locality.

The court having jurisdiction to adjudge a person bankrupt is the court of the district wherein the bankrupt has had his principal place of business, resided, or had his domicile for the preceding six months, or the greater portion thereof, or who, though not having his principal business, residence, or domicile within the United States, has property within its jurisdiction, or who, though without the United States, has been adjudged

bankrupt by a court of competent jurisdiction, and has property within the jurisdiction of such district court. Under section 30 of the bankrupt law the Supreme Court is given the power to prescribe necessary rules, forms, and orders as to procedure in bankruptcy; and, pursuant to that right, certain rules were made by the Supreme Court at the October term, 1898, the first term after the bankrupt law was enacted. Under this power the court has prescribed that, where a proceeding has been instituted in more than one district, the first hearing shall be had in the district in which the debtor has his domicile, but in case of partnerships the first hearing shall be had on the petition first filed, or, in case of voluntary petitions by different members of the same partnership, the court in which the petition is first filed shall take and retain jurisdiction, subject to the right prescribed by the bankrupt act itself to transfer cases to the district where it can be proceeded with for the greatest convenience of parties in interest.[9]

Under these provisions, where a bankrupt had a workshop in one district, but carried on business on his own account in another, it was held that the latter was a proper district in which to file a petition, though the court did not go so far as to say that it could not have been filed in the other.[10] So in an involuntary proceeding against a corporation which had its main works in Rhode Island, but had shut down there, and continued business in New York, where its executive and banking business was done, it was held that the petition could properly be filed in New York.[11] In the case of a party who spent most of his time abroad, it was held that he could still file his petition in the district of his domicile, if his original domicile had not been given up, and he had returned before filing his petition, with the intention of making his home at that point.[12] Under the power to transfer from one district to another given

[9] Bankr. Rule 6, 172 U. S. 654, 18 Sup. Ct. v, 43 L. Ed. 1189.
[10] In re Brice (D. C.) 93 Fed. 942.
[11] In re Marine Machine & Conveyor Co. (D. C.) 91 Fed. 630.
[12] In re Williams (D. C.) 99 Fed. 544.

by section 32 of the act, an involuntary petition had been filed in Georgia, and the debtor had filed his voluntary petition in New York. He had lived in Georgia. The great bulk of his debts had been contracted there, and he was an employé of a corporation which was located in Georgia, and had succeeded to the business of his former firm. It was held in this case that Georgia was the proper and most convenient district, and that the right to transfer applied not simply to involuntary cases, but to an involuntary proceeding in one district, and a voluntary in another.[13] But if a petition is filed where the debtor had not resided or been domiciled, a creditor who wishes to object must do so promptly. He cannot come into the proceeding, prove his claim, and then urge this lack of jurisdiction in opposition to the bankrupt's discharge, for the reason that by coming into the proceeding he has waived any objections to jurisdiction; the question being merely one of personal jurisdiction, and not of jurisdiction over the subject-matter.[14]

PARTIES—VOLUNTARY PROCEEDINGS.

40. Any person who owes debts, except a corporation, may avail himself of the benefits of the act as a voluntary bankrupt. This, however, does not apply to any one non compos mentis, nor to one under any legal disability.

This applies to a resident alien.[15] Notwithstanding its broad language, however, there are some parties who cannot avail of the act. An infant cannot file a voluntary petition in bankruptcy, nor can an involuntary petition be filed against him, for the reason that an infant needs no discharge against the great mass of his debts. Hence, where an involuntary proceeding had been instituted against a partnership which had an infant member, the proceeding was dismissed as to him, though

[13] In re Waxelbaum (D. C.) 98 Fed. 589.
[14] In re Mason (D. C.) 99 Fed. 256.
[15] In re Boynton (D. C.) 10 Fed. 277.

it was retained as to the other partners.[16] On similar principles, a lunatic cannot file a voluntary petition, nor can an involuntary petition be filed against him for debts incurred while non compos mentis, as a lunatic could not commit an act of bankruptcy. If, however, the act of bankruptcy was committed while sane, his supervening lunacy would not prevent a procedure against him.[17] Nor can a married woman file a voluntary petition, or be proceeded against, except in states where her common-law disabilities have been removed, and she has power to contract.[18]

The eighth section of the present bankrupt law provides, also, that the death or insanity of the bankrupt shall not abate the proceedings. Of course, this alludes to death or insanity supervening after the filing of the petition.

SAME—INVOLUNTARY PROCEEDINGS.

41. Under the fourth section of the bankrupt act, as amended February 5, 1903, any natural person, except a wage earner, or a person engaged chiefly in farming or tillage of the soil, any unincorporated company, and any corporation engaged principally in mining, manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of a thousand dollars or over, may be adjudged an involuntary bankrupt. This is inapplicable to persons under legal disabilities, on the same principle as the exception above stated in the case of voluntary bankruptcy.

For reasons already given, infants, lunatics, and married women cannot be proceeded against under the qualifications

[16] In re Dunnigan (D. C.) 95 Fed. 428. See, also, In re Duguid (D. C.) 100 Fed. 274.

[17] In re Marvin, Fed. Cas. No. 9,178; In re Pratt, Fed. Cas. No. 11,371; In re Weitzel, Fed. Cas. No. 17,365; In re Funk (D. C.) 101 Fed. 244.

[18] In re Kinkead, Fed. Cas. No. 7,824; In re Goodman, Fed. Cas. No. 5,540.

stated, so that they are excepted as much as if they had been expressly named. All other natural persons, except those named in the act, may be proceeded against.

Wage earners.

The exception of wage earners from the list of involuntary bankrupts introduces a large field for construction by the courts, as the term is a very difficult one to define. The twenty-seventh of the preliminary definitions in the act defines it as meaning an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year. But for this definition, it would probably have been held to include those who work for wages, as distinguished from those who work for salaries, or compensation measured by the work rather than the period. The word "wages" usually implies the compensation of persons of small means.[19] Counsel fees are considered as above the grade of wages, and hence could hardly be included.[20] Under similar statutes, like lien acts, a contractor is not usually counted as an employé, nor his compensation as wages.[21] Another section of the act (section 64) names among the preferred debts wages due to workmen, clerks, or servants. It is not entirely safe to consider the decisions construing this section as in point in reference to the meaning of "wage earner," for the use of different language by Congress is indicative of different intent; and, besides, a clause changing the ordinary rule of equality would be more strictly construed than the first. Under this latter section, however, it has been held that a traveling salesman who is paid a salary of five thousand dollars does not secure any priority on account of "wages due to workmen, clerks, or servants." [22]

[19] Gordon v. Jennings, 9 Q. B. Div. 45.

[20] Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023.

[21] Riley v. Warden, 2 Exch. 59; Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310.

[22] In re Scanlan (D. C.) 97 Fed. 26; In re Greenewald (D. C.) 99 Fed. 705.

Nor does the clause apply to the general manager of a mercantile corporation, who is paid a salary of twelve hundred dollars per annum, or to the president of a business corporation who is paid a salary of seven hundred dollars per annum.[23]

There is no such thing as a proceeding in involuntary bankruptcy against a decedent's estate.[24] The reason of this is that the ordinary laws for the administration of estates give ample remedies for securing its just distribution among creditors, and, as far as the debtor is concerned, he can hardly be considered as interested in securing a discharge. As to tillers of the soil, reference may be made to the cases cited below.[25]

Corporations.

As to the corporations against whom involuntary proceedings may be taken, the policy of the present law is very different from that of the act of March 2, 1867. That act allowed the proceeding against all moneyed, business, and commercial corporations and joint-stock companies. The language of the present act, as seen above, is entirely different, and therefore the decisions construing the old act must be but cautiously used in construing the present one. The intent of Congress evidently was to limit very largely the corporations against whom such proceedings can be taken, probably for the reason that other remedies for the liquidation of insolvent corporations are abundant, and the further reason that a bankrupt law is not as necessary to a corporation as to an individual. Since the former act, the growth of the law of corporations under the decisions of the courts as to procedure against them by means of receiverships and otherwise has been unprecedented; and the importance of operating some corporations, instead of winding them up summarily, has rendered it important to leave the other remedies free, as the present act

[23] In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183; In re Carolina Cooperage Co. (D. C.) 96 Fed. 950.

[24] Adams v. Terrell (C. C.) 4 Fed. 796.

[25] In re Thompson (D. C.) 102 Fed. 287; In re Luckhardt (D. C.) 101 Fed. 807.

only allows the continuance of the business of a corporation for limited periods. For instance, railroad corporations could be proceeded against under the former act, but it is perfectly obvious that they would not be included under the present act. It can well be seen how embarrassing a bankruptcy proceeding might be upon almost any corporation charged with a public service, and it was probably for this reason that they were omitted. In view of this patent intent of Congress to limit the range of the bankrupt act as to corporations, it would seem the duty of the courts to construe the language of the act strictly in this respect, though this has not always been done. For instance, in the case of In re San Gabriel Sanatorium Co.[26] it was held that a private corporation which operated a hospital for consumptives, not as a charity, but as a business venture, could be proceeded against in bankruptcy; the court holding that such a corporation was a trading or mercantile corporation. It would certainly seem that this was giving these two words an elasticity unknown to previous decisions. On the other hand, it has been held that a mutual fire insurance company could not be proceeded against.[27] The court, in its opinion, limited its holding to a mutual company, but the language of the act and the reasoning of the court would clearly apply to any insurance company. So, too, in a very interesting opinion, Judge Brown, of New York, held that a water company which furnished water to consumers in a city, and charged water rents, could not be proceeded against, even though it obtained part of the water so furnished by purchase.[28] The

[26] (D. C.) 95 Fed. 271. This case has been much questioned, and the preponderance of authority is in favor of a much narrower meaning of the words "engaged in trading or * * * mercantile pursuits." In re White Star Laundry Co. (D. C.) 117 Fed. 570; In re Surety Guaranty & Trust Co., 121 Fed. 73, 56 C. C. A. 654; In re H. J. Quimby Freight Forwarding Co. (D. C.) 121 Fed. 139.

[27] In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.) 96 Fed. 756.

[28] In re New York & W. Water Co. (D. C.) 98 Fed. 711. See, also, Dudley v. Corporation, 100 Mass. 183.

word "trading" is a classic in bankruptcy law, though the courts have been cautious in avoiding any general definition. Its general meaning seems to be one who buys and sells goods or merchandise of some sort. This construction has been put upon the word "tradesman" in the section of the old bankrupt law which required the keeping of certain books of accounts. Under that section, a baker who buys flour, and makes it into bread and sells it to customers, is considered a tradesman.[29] So, too, a butcher,[30] and also a stairmaker, who buys materials, makes them into stairs, and puts them up and sells them.[31] A railroad contractor, however, does not come within the term.[32] A large class of corporations is included under the word manufacturing. This would seem to cover any corporation which took any sort of raw or unfinished material, and either completed it into the finished product, or carried it a step nearer completion, like the owner of a steam sawmill, who takes lumber, prepares it for market, and sells it.[33]

PLEADINGS.

42. Bankruptcy proceedings are instituted by filing petitions sworn to by the petitioner, made out upon certain forms prescribed by the Supreme Court, which petitions set forth the facts necessary to show the jurisdiction and the grounds of bankruptcy.

With the voluntary petition are filed various schedules showing creditors, liabilities, assets, securities, and exemptions. In the involuntary proceeding the schedules need only be furnished by the petitioner in the event the bankrupt is absent or cannot be found. All creditors with provable claims can file petitions in involuntary bankruptcy when an act of bankruptcy has been com-

[29] In re Cocks, Fed. Cas. No. 2,933.
[30] In re Bassett (D. C.) 8 Fed. 266.
[31] In re Garrison, Fed. Cas. No. 5,254.
[32] In re Smith, Fed. Cas. No. 12,981.
[33] In re Chandler, Fed. Cas. No. 2,591.

mitted. In bankruptcy proceedings, amendments are freely allowed. A petition once filed cannot be dismissed without notice to the creditors.

Voluntary Proceedings.

Voluntary proceedings are instituted by the filing of a petition by the person entitled to the benefits of the act as a voluntary bankrupt. Form 1 [84] prescribed by the Supreme Court is used for this purpose. It contains allegations necessary to show the court the district in which it should be filed; also a statement that the petitioner owes debts which he is unable to pay in full, and that he is willing to surrender his property for the benefit of his creditors, except such as is exempt by law, and that he desires to obtain the benefit of the bankrupt act. It ends by a prayer that he be adjudged a bankrupt, and is sworn to. Annexed to the petition is a series of schedules. Schedule A contains a statement of the bankrupt's debts, and is subdivided so as to show (1) a statement of all creditors who are to be paid in full, or to whom priority is secured by law; (2) a statement of creditors holding securities; (3) a statement of creditors whose claims are unsecured; (4) a statement of the bankrupt's liabilities on paper for which others are primarily liable; and (5) a statement of accommodation paper.

Schedule B is a statement of the bankrupt's property, and is subdivided so as to show (1) his real estate; (2) his personal property, classified under numerous subheadings; (3) his choses in action, which are shown separate from his other personal property; (4) his property in reversion, remainder, or expectancy; (5) his property claimed as exempt; and (6) the books, papers, and other documents relating to his business and estate. At the end of these two detailed schedules is a summary both of his debts and assets. This form requires the report of everything claimed to be exempt, though, as a matter of fact, the exemption comes under the control of the bankrupt court only in a very qualified way. The eleventh subdi-

[84] 172 U. S. 667, 18 Sup. Ct. xi, 43 L. Ed. 1195.

vision of section 47 of the act requires the trustee to set apart the bankrupt's exemption, and report the items and estimated value thereof to the court as soon as practicable after his appointment. While, therefore, the bankrupt court has the power of examining into the exemption to this extent, yet, when the exemption has once been set apart, it belongs to the bankrupt exclusively, and the court has no jurisdiction of controversies concerning it, as it is not part of the trust fund under the court's control.[85] The bankrupt court will follow the state decisions construing exemption laws.[86]

Pension money claimed as exempt under the provisions of the federal statutes must be reported.[87]

Partnership Petitions.

Form 2 [88] of the forms prescribed is intended to be used for a partnership petition. The fifth section of the bankrupt act contains careful provisions intended to secure the distribution of the partnership assets to the partnership debts, and the individual assets to the individual debts; hence the partnership petition must not only show the jurisdictional facts necessary, as in the case of the individual petition, but it must further show separately the partnership assets and the assets of the individual partners. When all the partners join in a partnership petition, the proceeding is a voluntary one; and, if they should join in the petition, it is unnecessary for the individual partners to file separate petitions.[89] When a petition is filed by a portion only of the partners, which purports not only to be an individual petition, but a partnership petition, the proceeding as to the partners who do not join therein is an involuntary one, and they are entitled to notice, and an opportunity of contesting the proceeding. This is ex-

[85] In re Camp (D. C.) 91 Fed. 745; Id., 97 Fed. 981, 38 C. C. A. 689; In re Grimes (D. C.) 96 Fed. 529.

[86] In re Wyllie, Fed. Cas. No. 18,112.

[87] In re Bean (D. C.) 100 Fed. 262.

[88] 172 U. S. 679, 18 Sup. Ct. xviii, 43 L. Ed. 1207.

[89] In re Gay (D. C.) 98 Fed. 870.

pressly required by the eighth order in bankruptcy.[40] Of course, an individual petition, purporting to be on behalf of the individual only, would not involve any procedure against the partnership, for the individual member of a partnership may be insolvent, and not the other partners, and the partnership itself may be perfectly solvent.

As long as a partnership owes debts, bankruptcy proceedings may be taken, for there is no "final settlement," in the language of the fifth section of the act, when debts are due, even though there may be no assets.[41] When a voluntary petition is filed in the proper court, a bankruptcy adjudication is a matter of course, and it cannot be contested on the facts. Even though the debtor may be solvent, if he voluntarily chooses to come into the bankrupt court and surrender his property for the benefit of his creditors, the court, in the language of Judge Lowell, "takes him at his word, and makes provision for carrying out his intention of distributing his property." The creditors certainly would have no right to complain, or to deny his right, even though he were solvent; and hence, in the case of a voluntary petition, it is not necessary, in any event, to allege insolvency, and the creditors have no right to contest the filing of the petition.[42] If, however, a petition is filed in a court which has no jurisdiction of it, creditors may, by prompt action, move to dismiss the petition for want of jurisdiction; but they cannot appear and participate in the proceeding, and afterwards question the jurisdiction of the court by opposing the bankrupt's discharge on that ground.[43]

A bankrupt may amend his petition by adding the name of creditors omitted, and it is not necessary to give notice of such

[40] Metsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; In re Murray (D. C.) 96 Fed. 600; In re Altman (D. C.) 95 Fed. 263, 172 U. S. 656, 18 Sup. Ct. v, 43 L. Ed. 1190.

[41] In re Hirsch (D. C.) 97 Fed. 571.

[42] In re Jehu (D. C.) 94 Fed. 638; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[43] In re Waxelbaum (D. C.) 98 Fed. 589; In re Mason (D. C.) 99 Fed. 256.

intended amendment.[44] This right to amend is expressly recognized by the eleventh order in bankruptcy.[45] When a petition has been filed, it cannot be dismissed without notice to the creditors. This is expressly required by paragraph "g" of section 59 of the act.

Involuntary Proceedings.

Form 3 [46] provides for the case of an involuntary petition. Its first paragraph shows the jurisdictional facts—that is, the debtor's residence or place of business—and also contains the allegation that he owes debts to the amount of a thousand dollars, as required by section 4b of the bankrupt act. It must show his business also.[47] Its next paragraph shows that the petitioners or creditors have provable claims in excess of the securities held by them to the sum of five hundred dollars, which is the requisite prescribed by section 59b of the act. It then sets out the claims. The next paragraph alleges insolvency, where necessary, and charges an act of bankruptcy; stating the facts of the act of bankruptcy with sufficient certainty to enable proper defense to be made. It cannot merely follow the language of the statute.[48] It prays for a subpœna, and that the debtor be adjudged a bankrupt, and is sworn to. It would not seem, under the language of the act, to be necessary to file any schedule with an involuntary petition at the outset, but the ninth order in bankruptcy [49] provides that, if the bankrupt is absent or cannot be found, the petitioning creditor must file, within five days after the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. The eleventh order in bankruptcy [50] allows these

[44] In re Hill (D. C.) 5 Fed. 448.
[45] 172 U. S. 657, 18 Sup. Ct. v, 43 L. Ed. 1190.
[46] 172 U. S. 681, 18 Sup. Ct. xix, 43 L. Ed. 1208.
[47] In re Taylor, 102 Fed. 728, 42 C. C. A. 1.
[48] In re Cliffe (D. C.) 94 Fed. 354; In re Nelson (D. C.) 98 Fed. 76.
[49] 172 U. S. 656, 18 Sup. Ct. v, 43 L. Ed. 1190.
[50] 172 U. S. 657, 18 Sup. Ct. v, 43 L. Ed. 1190.

petitions also to be amended. The amendment may add additional grounds, and it may also make the averments of the petition more certain.[51]

Not every creditor of the bankrupt can file such petitions. By the fifty-ninth section of the act, this can be done only by those who have provable claims. Those who have preferences cannot prove their claims, except to the excess of the debt over the security. This is regulated by the fifty-seventh and fifty-ninth sections of the act.

The act as first passed provided that the claims of creditors who had received preferences should not be allowed unless such creditors should surrender their preferences. This, however, has been amended by the act of February 5, 1903, so that the present form of this paragraph provides that the claims of creditors who have received preferences voidable under section 60, subd. "b," or to whom conveyances, transfers, assignments, or incumbrances void or voidable under section 67, subd. "e," have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

Under this amendment, those who have valid preferences can prove their claims without being held to waive their preferences. Under the act of 1867 it had been held that a secured creditor who came into the proceeding and proved his claim waived his preference.[52]

A creditor of a partnership may prove against an individual member of the partnership, as that individual is still his debtor.[53]

If the petition shows the requisite number and amount of creditors and debts on its face, the court has jurisdiction, and the proceeding could not be attacked collaterally by showing that, as a matter of fact, these jurisdictional facts did not exist. Such a question would be for the bankrupt court it-

[51] In re Mercur (D. C.) 95 Fed. 634; In re Nelson (D. C.) 98 Fed. 76.
[52] In re Bear (D. C.) 5 Fed. 53.
[53] In re Mercur (D. C.) 95 Fed. 634.

self, and could not be inquired into by another court where the proceedings on their face appear to be regular.[54] Paragraph "f" of the fifty-ninth section of the act allows creditors other than the original petitioners to enter their appearance at any time and join in the petition, or to file an answer, and be heard in opposition to the petition. If it develops on the examination of the question of fact that there is a deficiency of creditors, in number or amount, others who join in the petition under this provision can be counted, and the jurisdiction of the court will be upheld.[55]

In estimating the amount, interest may be included as part thereof.[56]

A creditor who joins in the proceeding cannot defeat the proceeding by subsequently withdrawing.[57]

Under the express provisions of the act, neither a voluntary nor involuntary petition can be dismissed, even by consent of parties, until after notice to the creditors.[58]

This provision of the act, however, alludes only to dismissals of petitions before a hearing on the merits. No notice is required when the petition is dismissed by the court as the result of a trial.[59]

The only party defendant to the petition in the first instance is the alleged bankrupt. If there is a proceeding against him, and he is a member of a partnership, other members of the partnership cannot voluntarily come in and submit the partnership to the proceeding, as the act provides ample opportunity for them to avail of it by filing separate petitions.[60]

[54] In re Duncan, Fed. Cas. No. 4,131.

[55] In re Romanow (D. C.) 92 Fed. 510; In re Bedingfield (D. C.) 96 Fed. 190; In re John A. Etheridge Furniture Co. (D. C.) 92 Fed. 329.

[56] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832.

[57] In re Bedingfield (D. C.) 96 Fed. 190.

[58] Section 59g [U. S. Comp. St. 1901, p. 3445]; In re Cronin (D. C.) 98 Fed. 584.

[59] Neustadter v. Dry Goods Co. (D. C.) 96 Fed. 830.

[60] Mahoney v. Ward (D. C.) 100 Fed. 278.

The petition must allege insolvency, except in cases where insolvency is not a material issue, and it must also charge an act of bankruptcy with reasonable certainty. This brings up for discussion the question, what constitute acts of bankruptcy? Here it is important to remember that the acts of the bankrupt himself alone are being considered, and those simply for the purpose of deciding the question whether he should be adjudicated a bankrupt. There are many dealings by him which are acts of bankruptcy as far as he is concerned, and violations of the bankrupt law, and yet which are not voidable as to the grantees or beneficiaries under them. The bankrupt may intend to give a preference, for instance, and his act in giving it will be an act of bankruptcy; and yet the grantee, if he has not the knowledge, or means of knowledge, required by the bankrupt law, may be enabled to sustain his preference. Hence it must be remembered that at this stage of the proceeding, which involves simply the issue whether the defendant should be adjudicated a bankrupt, the question of the validity of his acts as to third parties is not involved. Those questions come up after adjudication, when proceedings are taken to set them aside.

ACTS OF BANKRUPTCY—DEFINITION AND ENUMERATION.

43. Acts of bankruptcy are such acts as, in accordance with the terms of the statute, render him who commits them a subject for involuntary bankruptcy proceedings.

These acts, as specified in the third section of the act, may be enumerated as follows:

(a) Transfers to hinder, delay, and defraud creditors.
(b) Illegal preferences.
(c) Suffering preference by legal process.
(d) Assignments.
(e) Admission of insolvency in writing.

SAME—TRANSFERS TO HINDER, DELAY, AND DEFRAUD CREDITORS.

44. It is an act of bankruptcy for a person to convey, transfer, conceal, or remove, or permit to be concealed or removed, any part of his property, with intent to hinder, delay, or defraud his creditors, or any of them. This is broader in meaning than the state statutes based on the statute of Elizabeth. Solvency is a good defense to a petition filed under this act of bankruptcy.

This subdivision makes as an act of bankruptcy any attempt to defraud his creditors which would constitute a violation of the state statutes based upon the statutes of Elizabeth. However, it goes further than this. At common law, independent of the bankrupt act, a preference of one creditor over another by a debtor was not a violation of such statutes, if the debt was an actual, bona fide debt; but, under the bankrupt act, even a preference of one bona fide creditor over another is held to be not only an act of bankruptcy, but void, as intended to hinder, delay, and defraud creditors; and not only a preference of one creditor over another, but a debt of general assignment, securing all creditors exactly alike, is held to be not only an act of bankruptcy, but void, as to the trustee in bankruptcy, as intended to hinder, delay, and defraud creditors, for its effect would be to withdraw the administration of the bankrupt's estate from the bankrupt court and place it in the hands of a trustee, and this would hinder the creditors from the collection of their debts through the court primarily designed for that purpose.[61]

A sale of property, however, is not necessarily fraudulent, even though the vendor is insolvent. If made in the ordinary course of business, without circumstances of suspicion, it would be perfectly valid as to the vendee, and could hardly be con-

[61] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Gutwillig, In re (D. C.) 90 Fed. 475.

sidered an act of bankruptcy. Any contrary doctrine would put a clog upon the free alienation of property, which would be injurious in its effects upon the business community.[62] So, where a corporation issued bonds to take up its floated indebtedness, and conveyed its property in trust to secure them, with the idea of thereby placing itself in a better position to carry on its business, this could not be held to be an act of bankruptcy, even though the corporation at the time might have been insolvent.[63]

It will be observed that this first act of bankruptcy does not add, as several of the others do, the additional qualification that the act must be done while insolvent. However, paragraph "c" of section 3 provides that it shall be a complete defense to any proceeding instituted under the first subdivision of the section to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of filing the petition against him. In the case of West Co. v. Lea[64] the Supreme Court decided that the subdivision in this paragraph "c" referred simply to this provision relating to transfers to hinder, delay, and defraud creditors, and not to any of the others; hence, under this decision, solvency is a complete defense to a petition alleging such a conveyance by the debtor as is contemplated under this first subdivision.

SAME—ILLEGAL PREFERENCES.

45. It is an act of bankruptcy for a person to transfer, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors. In this act of bankruptcy the intent of the debtor alone is material.

This act is described in section 3 as consisting of having "transferred while insolvent any portion of his property to one

[62] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198.
[63] In re Union Pac. R. Co., Fed. Cas. No. 14,376.
[64] 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

or more of his creditors, with intent to prefer such creditors over his other creditors."

In considering this as an act of bankruptcy, independent of the question how far it is voidable, it will be observed that the intent of the debtor alone is material. If he intended a preference, the fact that the creditor was not aware of such intent, or had not such reasonable cause to suspect it as to charge him with knowledge, will none the less affect the act as an act of bankruptcy, however good a defense it may be to an attempt to set it aside as to the creditor.[65] When a debtor transfers property to cover a debt, and its necessary effect is to give the creditor a preference, the intent to prefer will be inferred, as that is a natural consequence of the act.[66] Preferences of this sort may be accomplished as well by a payment in money as by a transfer of any other kind of property.[67]

It is to be noted that intent is necessary in both the acts of bankruptcy so far described.

SAME—SUFFERING PREFERENCES BY LEGAL PROCESS.

46. It is an act of bankruptcy for a person to suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not at least five days before a sale or final disposition of any property affected by such preference to vacate or discharge such preference.

As the policy of the bankrupt law is an equitable distribution of a bankrupt's estate among his creditors, it is necessary to secure it not only against the acts of the bankrupt himself, but also against the attempt of his creditors to secure priority over each other. This is the object of this section, and, being its object, it is an act of bankruptcy, if such a result is brought about by the creditors, even though the bankrupt himself is

[65] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812.

[66] Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522.

[67] In re Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582.

not privy to their act, and merely suffers them to proceed. Under this section an intent of the debtor is unnecessary, which sharply distinguishes it from the two preceding sections, and also from the corresponding section of the bankrupt act of 1867. This clause of the act came under the consideration of the Supreme Court in the case of Wilson v. Nelson.[68] There a debtor, long before the filing of a petition in bankruptcy, and indeed before the enactment of the bankrupt law, had given a creditor an irrevocable power of attorney to confess judgment upon a promissory note. After the bankrupt act went into effect, the creditor executed this power of attorney, and proceedings in bankruptcy were instituted, alleging that the act of the debtor in permitting the execution of this power of attorney was an act of bankruptcy. The court sustained this contention, although the debtor had merely passively acquiesced, and in fact was powerless to do anything. The opinion was based upon the language of the present act, and distinguished cases decided under the old act, which it held were no longer in point. Prior to this decision, some decisions of inferior courts had held that in the case of a power of attorney given under similar circumstances, and afterwards executed, the act of the debtor in permitting it was not an act of bankruptcy, but these cases must now be considered as overruled.

Care must be taken, however, to distinguish this case from a procedure to foreclose a lien created before the act, or so long before the filing of the petition as not to be subject to attack. In such case the fact that the lien is foreclosed afterwards does not make it an act of bankruptcy on the part of the debtor. The distinction is due to the fact that no lien arises at the time of giving a power of attorney to confess judgment, and the mere giving of that power of attorney does not enable a creditor to obtain a preference, as it may never be executed, whereas, in proceedings to foreclose a lien, the lien is already in ex-

[68] WILSON v. NELSON, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147.

istence, and the obtaining of the preference would date back to the time of executing the lien, and not, as in the case of a power of attorney, to the time of executing the power of attorney.[69] Under this clause, however, the mere appointment of a receiver for a corporation would not be an act of bankruptcy, as no final disposition of the property would be made by such appointment.[70] Creditors who wish to proceed under this section do not have to wait until an actual sale, or disposition of the property. If a sale has been advertised, they can proceed within five days before the advertisement is to be carried out.[71] No actual participation by the debtor is necessary, but mere passive submission is an act of bankruptcy under this clause, if the result is that the creditor secures the preference.[72]

The language of this clause is conditioned upon the debtor not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such a preference. The privilege of vacating or discharging thus given to the debtor would seem, however, to be rather an empty one. If he goes and pays off the creditor and releases the property, and is insolvent when he does it, that would be an act of bankruptcy of itself. Hence, if he is actually insolvent, about the only thing he can do is to file a petition in bankruptcy himself; and this procedure is hinted at in the decisions.[73] But even that privilege cannot be exercised by a corporation, so that, if it is insolvent, nothing remains to it but to let matters take their course. Of course, either an individual or a corporation can defend on the ground

[69] In re Chapman (D. C.) 99 Fed. 395; In re Ferguson (D. C.) 95 Fed. 429; METCALF v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

[70] In re Baker-Ricketson Co. (D. C.) 97 Fed. 489.

[71] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812.

[72] In re Reichman (D. C.) 91 Fed. 624; In re Cliffe (D. C.) 94 Fed. 354.

[73] WILSON v. NELSON, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; In re Moyer (D. C.) 93 Fed. 188.

of solvency, if the facts sustain it, for in this subdivision insolvency is a necessary requisite.

SAME—ASSIGNMENTS AS AN ACT OF BANKRUPTCY.

47. It is an act of bankruptcy for a person to make a general assignment for the benefit of his creditors, or, being insolvent, to apply for a receiver or trustee for his property, or when, because of insolvency, a receiver or trustee is put in charge of his property under the laws of a state, of a territory, or of the United States.

In the act as originally passed, any one committed an act of bankruptcy who made a general assignment for the benefit of his creditors. To this the amendment of February 5, 1903, has added the following words: "or being insolvent applied for a receiver or trustee for his property, or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Under the act of 1867, the mere making of a general assignment, though without preferences, was an act of bankruptcy, as it was evidence of an intent to prevent the administration of the debtor's property in the bankrupt court;[74] and the making of a general assignment is an act of bankruptcy, independent of any intent on the part of the debtor to defeat the operation of the law, and independent of the fact whether he is insolvent or not, for neither intent nor insolvency are specified as essentials under this clause as it stood in the original draft of the present act.[75] It has even been held that a paper purporting to be an assignment is an act of bankruptcy, though, as a matter of fact, it is invalid, and

[74] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

[75] WEST CO. v. LEA, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

though it is a partnership assignment that does not convey individual property.[76]

In the case of Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co.[77] it was held that, as the act applies only to general assignments, a debt which reserved a balance to the grantor after payment of creditors, if not in actual bad faith, or with no intent to evade the law, was not a general assignment, and did not contravene the act. This decision would seem subject to serious question. If it purported to be a conveyance of all the bankrupt's property to secure all his creditors, it is difficult to see how a mere reservation of any unused balance would prevent it from being a general assignment. However, creditors who prove their claims before the assignee, and participate in the benefit of the general assignment, could not come into court afterwards and allege such assignment as an act of bankruptcy.[78]

An application of a corporation under a state statute for a dissolution and the appointment of a receiver would not be a general assignment or an act of bankruptcy, under the language of the original act.[79]

In consequence of the decisions holding that the appointment of a receiver was not an act of bankruptcy under the original act, the amendment was introduced which has been set out above. Clearly, under it, the appointment of a receiver, either at the request of or against the wishes of the alleged bankrupt, is an act of bankruptcy, if such appointment is made on the ground of insolvency. Hence insolvency, while not an essential under the first part of this fourth clause as it now stands, is essential under the part added by the amendment.

[76] In re Meyer, 98 Fed. 976, 39 C. C. A. 368.

[77] (D. C.) 99 Fed. 699.

[78] Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; In re Romanow (D. C.) 92 Fed. 510; Moulton v. Coburn (C. C. A.) 131 Fed. 201.

[79] In re Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372.

However, the appointment of a receiver on other grounds than insolvency would still not be an act of bankruptcy.

SAME—ADMISSION OF INSOLVENCY IN WRITING.

48. It is an act of bankruptcy for a person to admit in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground. This is a method open to corporations.

This act of bankruptcy is thus defined in the act, "admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground." This gives some opportunity to corporations to go into bankruptcy if they wish. They need only make this admission in writing by proper authority, and then three friendly creditors can do the rest. The admission, however, must be unqualified, and must be before the filing of the petition. For instance, a corporation which passed a resolution authorizing one of its officers to make this admission in the event of an involuntary petition in bankruptcy being filed against said company did not accomplish its purpose, for, under the language of the admission, it could not be made until the petition was filed, and, under the language of the bankrupt act, a petition could not be filed until it had made an admission in writing, and that admission had to be set out in the petition.[80] It is an interesting question what officers of a corporation can make an admission of this sort, fraught with such far-reaching consequences. Under ordinary principles of corporation law, a board of directors has power to do anything necessary in carrying on the business of the company, but it has not power to take steps which might cause a dissolution of the company. Hence it has been held that, under the law of Massachusetts, this admission cannot be made by the board of directors, and that even a subsequent vote of the stockholders could not

[80] In re Baker-Ricketson Co. (D. C.) 97 Fed. 489.

date back so as to make it valid.[81] Undoubtedly the stockholders themselves could make or authorize such an admission, for they can wind up the corporation. The question depends largely upon the corporation laws of the different states. In the case of In re Marine Machine & Conveyor Co.[82] an admission by the president and directors was held sufficient, though the question of their power to make it did not seem to have received any special attention.

TIME OF FILING PETITION.

49. The petition must be filed within four months after the commission of the act of bankruptcy. Petitions must be made in duplicate, and both the original and duplicate must be filed within this period.

Where the act consists of having made a transfer with intent to defraud or to give a preference, or of having made a general assignment, the four months date from the recording of the paper, if it is a paper that requires record. If the transfer or preference, however, is made by such an act or writing that it does not require record, the four months date from the time when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless petitioning creditors have received actual notice of such transfer or assignment. Under section 59a, petitions must be in duplicate; and accordingly it has been held that both the original and the duplicate must be filed within the four months, and that the failure to file the duplicate is not such an error as can be subsequently corrected under the eleventh order in bankruptcy.[83] The day on which the act of bankruptcy is

[81] In re Bates Mach. Co. (D. C.) 91 Fed. 625.

[82] (D. C.) 91 Fed. 630. See, also, In re Rollins Gold & Silver Min. Co. (D. C.) 102 Fed. 982.

[83] In re Stevenson (D. C.) 94 Fed. 110; In re Dupree (D. C.) 97 Fed. 28.

committed is excluded in the computation of the time.[84] The four months date from the act of bankruptcy, not from the mere recording of any paper indirectly connected with it. Hence, where an insolvent corporation sold land, and used the proceeds to pay some of its creditors, and this use of the proceeds was attacked as a preference, it was held that the time ran from the date of the payments to the creditors, not from the date of recording the deed of sale of the land.[85]

[84] Id.

[85] In re Mingo Valley Creamery Ass'n (D. C.) 100 Fed. 282.

CHAPTER VI.

THE DISTRICT COURT (Continued)—BANKRUPTCY (Continued).

50. The Process on an Involuntary Petition.
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THE PROCESS ON AN INVOLUNTARY PETITION.

50. The process in an involuntary proceeding consists of an order to show cause, as a preliminary, and service of a copy of the petition and a writ of subpœna upon the defendant. The subpœna is similar to the original equity subpœna, and its service is like that of the equity subpœna, except in certain respects specified by the statute.

In case personal service cannot be made, an order of publication is provided for, which is modeled upon the order prescribed in suits to enforce equitable claims.

Section 18a of the bankruptcy act provides that, upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days unless the judge shall, for cause, fix a longer time.

The original act went on to provide that, in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as pro-

vided by law for notice of publication in suits in equity in courts of the United States.

The amendment of February 5, 1903, changed this last clause by providing that this notice of publication shall be given in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication, unless the judge shall, for cause, fix a longer time.

Under this provision the first process on an involuntary petition is an order to show cause, providing also that a copy of the petition and a writ of subpœna be served upon the defendant. A form of such an order to show cause is given as form 4 [1] of those prescribed by the Supreme Court of the United States, and the subpœna as No. 5 [2] of the same forms. This subpœna is not in the exact form of the original equity subpœna, and the act does not require it to be, but merely requires that its service shall be like that of the equity subpœna, except in the particulars named. This subpœna must be issued, and cannot be waived by the bankrupt. He can accept service on it, but he cannot stop its issue. This is for the reason that creditors also can contest an involuntary petition, and the issuance of the subpœna is necessary in order to fix a return day within which creditors can contest.[3]

The Order of Publication.

In case personal service cannot be made, an order of publication can be had as prescribed by the act. This order of publication is modeled upon the order prescribed in suits to enforce equitable liens. Section 738 of the Revised Statutes first provided for service by publication in such cases, but

[1] 172 U. S. 682, 18 Sup. Ct. xx, 43 L. Ed. 1209.
[2] 172 U. S. 683, 18 Sup. Ct. xx, 43 L. Ed. 1209.
[3] In re L. Humbert Co. (D. C.) 100 Fed. 439.

its provisions were enlarged and practically superseded by the act of March 3, 1875.[4] It provides, in substance, that, when personal service cannot be made, "it shall be lawful for the court to make an order directing such absent defendant, or defendants, to appear, plead, answer or demur, by a day certain to be designated." No form of an order of publication is given among those prescribed by the Supreme Court. Such an order would be a simple one, and need only follow the statute. The following is suggested as a form for the purpose:

"It appearing that personal service cannot be made upon the defendant herein, it is ordered that said defendant do appear, plead, answer, or demur to the petition within ten days from the last publication hereof, at ....., in the ..... District of .....; and it is further ordered that this order be published in the ....., a newspaper published in the ..... of ....., in ....., District of ....., where this suit is pending, on the ..... day of ..... and the ..... day of ....."

THE WARRANT OF SEIZURE.

51. If, through danger of dissipation of the property, a necessity appears therefor, it is provided that an order may issue for the seizure of the property on behalf of the court, on satisfactory affidavits having been given with bond.

The petitioning creditors may simply issue and serve the notice above, without any interference with the property of the defendant bankrupt. If, however, they believe that there is any danger of its dissipation, they are permitted, by section 69a of the act, on satisfactory proof by affidavit that the bankrupt has neglected, or is neglecting, or is about to

[4] 1 U. S. Comp. St. 1901, p. 513.

so neglect his property that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, to apply to the judge for a warrant to the marshal to seize and hold it subject to further orders, and the judge is authorized to issue such a warrant. In such case a bond must be given to indemnify the bankrupt for any damages inflicted. This provision evidently contemplates such a procedure after the filing of the petition, and requires at least a prima facie case to be made by affidavit. The bond prescribed by it and by section 3e of the act is only in case it is desired before adjudication to protect the property, as is evident from the language of these two sections. After adjudication the court has constructive custody of the property, and in such case it can proceed by summary process to take charge of the property, without requiring a bond.[5]

This warrant to the marshal authorizes the seizure not only of property in the hands of the bankrupt himself, but also of property claimed to be his that may be found in other hands.[6]

This fact, however, should not be allowed to confuse the procedure under the involuntary petition with the summary procedure to gain possession of the property. The only proper issue in the involuntary petition itself is whether the bankrupt has committed an act of bankruptcy. That is the only issue which the law contemplates as being tried upon that petition, and it would be bad practice to combine in the same petition a proceeding against third parties. That issue should be raised by an additional petition to the court, or rule to show cause, so as to keep the issues of the two entirely separate.[7]

[5] BRYAN v. BERNHEIMER, 181 U. S. 188, 195, 21 Sup. Ct. 557, 45 L. Ed. 814.

[6] BRYAN v. BERNHEIMER, 181 U. S. 188, 195, 21 Sup. Ct. 557, 45 L. Ed. 814.

[7] In re Kelly (D. C.) 91 Fed. 504.

Under such a warrant the marshal may take charge of property in the hands of an assignee under a general assignment, as the bankruptcy act supersedes even proceedings of this sort in state courts under state insolvent laws.[8]

The Supreme Court has held that where there has been an adjudication in bankruptcy, but a trustee has not been appointed, the bankrupt court could retake the property by summary process, on petition, out of the hands of parties who had replevied the property in the bankrupt's possession after the adjudication. The court, however, bases this right rather upon subdivision 15 of section 2, allowing the courts to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act, and upon clause 3 of bankruptcy order 12,* than upon the clause authorizing the order of seizure.[9]

This warrant can also be used to compel the agent of the bankrupt, who has bankrupt money in his possession and asserts no adverse claim, to deliver the money to a proper custodian. In such case a mere refusal to surrender the money does not constitute an adverse claim, and the party holding it can be proceeded against by a rule to show cause.[10]

This principle, however, does not interfere with the general principle of comity of courts. If a state court has possession of bankrupt's property to enforce a lien created not against the provisions of the bankrupt act, and is proceeding to enforce that lien, the bankrupt court will not dispossess it merely because the final judgment enforcing the lien may come within the four months named in section 67 of the bankrupt act.[11]

[8] In re Sievers (D. C.) 91 Fed. 366.

[*] 172 U. S. 657, 18 Sup. Ct. vi, 43 L. Ed. 1190.

[9] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183.

[10] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

[11] METCALF v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128.

THE APPOINTMENT OF A RECEIVER.

52. Further provision is made for the protection of the bankrupt estate in the allowance of a receiver for this purpose when necessity therefor is shown. But this step is by no means a matter of course, and the exercise of the power should be carefully guarded.

Section 2, subd. 3, of the act, allows the courts to appoint receivers, or the marshals, upon the application of the parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of a petition, and until it is dismissed or the trustee has qualified. The cautious language of this clause shows that such a receiver is by no means a matter of course, and that the exercise of this power should be carefully guarded. The receiver is intended as a mere curator or temporary custodian of the property.

The act of 1867, though it did not contain any express provision allowing the appointment of a receiver, was construed as authorizing their appointment in cases where they were necessary, though the courts held them to be mere receivers to hold with limited powers.[12] Nor would they be appointed unless it appeared that the probabilities of the case were in favor of the complainant.[13]

Under the present act, the decisions so far have given them rather more extended powers than that of mere custodians. They may be appointed not only for the purpose of holding the property of the bankrupt, but of stopping the dissipation of the property by a grantee alleged to hold it illegally, and for that purpose may not only hold the property that they get possession of without suit, but may proceed in the courts to protect property alleged to belong to the bankrupt. This was expressly decided as to the powers of a receiver in the

[12] Lansing v. Manton, Fed. Cas. No. 8,077.
[13] Wilkinson v. Dobbie, Fed. Cas. No. 17,670.

case of In re Fixen,[14] and would seem to follow necessarily from the language of the court in Bryan v. Bernheimer.[15] The latter case was a proceeding by the marshal, but the principle is the same. As to property in another state, the receiver could not sue, but he can apply to the court for such temporary relief as is necessary to preserve it until the appointment of a trustee.[16] He may take property, though in charge of a state insolvent court.[17] And if the property is of such a nature as to render it necessary, he may sell it.[18]

THE DEFENSE.

53. The defense is set up by the bankrupt or by a creditor by means of a demurrer, plea, or answer; the questions generally raised being that of the jurisdiction, or whether there can be an adjudication in bankruptcy; the creditors being allowed to make only such defenses as could be set up by the bankrupt.

Section 18b of the bankrupt act provides that the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow. The amendment of February 5, 1903, has reduced this ten days to five days. It is apparent, therefore, that the defense may be made either by the bankrupt himself or by a creditor; and for this reason, as stated above, a subpœna must issue so as to fix the time within which the creditor can appear.[19]

The fact, however, that a creditor may also defend, does not give him the right to raise any issue that the bankrupt

[14] (D. C.) 96 Fed. 748.

[15] BRYAN v. BERNHEIMER, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814.

[16] In re Schrom (D. C.) 97 Fed. 760.

[17] In re John A. Etheridge Furniture Co. (D. C.) 92 Fed. 329.

[18] In re Becker (D. C.) 98 Fed. 407.

[19] In re L. Humbert Co. (D. C.) 100 Fed. 439; Goldman v. Smith (D. C.) 93 Fed. 182.

could not raise. On the original petition the validity of transfers, as far as the creditor is concerned, is not involved. When he defends he simply stands in the shoes of the bankrupt, and sets up such defense as the bankrupt alone could set up.[80] Assuming that the jurisdictional facts are all made out, practically the only issue that the bankrupt or a creditor can raise on the petition itself is whether an act of bankruptcy has been committed. This is clear from the language of many clauses in the act. For instance, section 18d speaks of the bankrupt or any of his creditors appearing within the time limited and controverting "the facts alleged in the petition." Section 59b provides that the prayer of the petition is "to have him adjudged a bankrupt," and section 59 adds a provision that creditors other than the original petitioners may "be heard in opposition to the prayer of the petition"; thus showing that, even when creditors appear, they can only resist the adjudication in bankruptcy, and cannot raise questions as to the validity of conveyances to them, or other questions personal to them. There are other means provided for raising these questions.

As to the form of the defense, the provision that the bankrupt or any creditor may appear and plead is not to be construed literally, as meaning that the form of the defense must be a plea. Section 19a provides that a person against whom an involuntary petition has been filed shall be entitled to a jury trial on filing a written application therefor "at or before the time within which an answer may be filed." Section 59f provides that creditors other than original petitioners may at any time enter their appearance and join in the petition, "or file an answer and be heard in opposition to the prayer of the petition." It is clear, therefore, that the word "plead" is merely equivalent to "making defense," and that the form

[80] Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

of defense may be according to the ordinary rules of pleading; that is, by plea, demurrer, or answer.

Form 6 of those prescribed by the Supreme Court [21] can be followed in most cases, and is sufficient, but this does not prevent a more elaborate defense and a setting up of other matters.[22] In fact, this form could not possibly answer for many defenses that might be made, as, for instance, the question whether the requisite number of creditors have joined, and whether their debts aggregate the right amount.

THE RIGHT TO A JURY.

54. The bankrupt is given the right to a jury upon the question of his insolvency and the question whether he has committed an act of bankruptcy, provided he files a written application therefor at or before the time within which an answer may be filed.

This means a jury trial according to the course of the common law, not a mere issue out of chancery, and hence proceedings on a trial are reviewable only by writ of error and on bills of exceptions, where bills of exceptions are ordinarily necessary.[23]

Ordinarily the burden of proof is upon the creditors to make out the facts charged in the petition.[24] Section 3, "c" and "d," however, expressly provides that the burden of proving solvency shall be upon the bankrupt when that is set up as a defense to the charge that the bankrupt has attempted to hinder, delay, or defraud his creditors, or when he fails to appear with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tend-

[21] 172 U. S. 684, 18 Sup. Ct. xxi, 43 L. Ed. 1209.

[22] Mather v. Coe (D. C.) 92 Fed. 333; In re Paige (D. C.) 99 Fed. 538.

[23] ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

[24] In re Rome Planing Mill Co. (D. C.) 96 Fed. 812; In re Taylor, 102 Fed. 728, 42 C. C. A. 1.

ing to estat lish solvency or insolvency, on a charge of making an illegal preference, or suffering or permitting one.

As the trial is according to the course of the common law, this means that the evidence will be taken before the jury in open court, except in cases where it can be taken by deposition under the present rules of common-law practice in the federal courts.

THE ADJUDICATION.

55. The next step in the progress of a bankruptcy case, if the issue raised on the petition is decided against the bankrupt, is the adjudication.

In case of a voluntary petition this is a matter of course.[25] In case of an involuntary petition it is a matter of course if the issues are decided against the bankrupt, and it is also a matter of course if the bankrupt makes no defense.[26] If the judge is present, the adjudication is made by him. If he is absent from the district or the division of the district in which the petition is filed, the clerk refers the case to the referee, and the referee on such reference can make the adjudication.[27] The order of reference, therefore, when made by the clerk, is made before adjudication, and for the purpose of enabling the referee to make the adjudication. When made by the judge, it is after adjudication, and for the purpose of investing the referee with the general supervision of the case in its details, which the bankruptcy act contemplates. The things required to be stated in the order are set out in bankruptcy order 12,[28] and its form constitutes No. 14 [29] and No. 15 [30] of the forms prescribed by the Supreme Court.

[25] Bankr. Act, § 18g; HANOVER NAT. BANK v. MOYSES, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[26] Bankr. Act, § 18e.

[27] Bankr. Act, § 18e–g; Id. § 38a (1).

[28] 172 U. S. 657, 18 Sup. Ct. vi, 43 L. Ed. 1190.

[29] 172 U. S. 690, 18 Sup. Ct. xxv, 43 L. Ed. 1212.

[30] 172 U. S. 690, 18 Sup. Ct. xxv, 43 L. Ed. 1212.

THE CREDITORS' MEETING.

56. The first important step after the adjudication is the meeting of creditors. The thirty-ninth section of the act requires the referee to give the notice of such meeting, and the fifty-eighth section requires at least ten days' notice by mail, and also by publication. The proceedings at a creditors' meeting are prescribed by the fifty-fifth section of the act. The judge or referee presides, and the important business before the meeting is the allowance or disallowance of claims of creditors, the examination of the bankrupt, and the election of a trustee.

Proof of Claims.

The proof and allowance of claims are regulated by the fifty-seventh section of the act, which has been amplified by bankruptcy order 21.[31] The proof is under oath; must specify the claim, the consideration, the payments, the securities held therefor, if any, and that the same is justly owing. Creditors are defined in the first section of the act as including any one who owns a demand or claim provable in bankruptcy, and may include a duly authorized agent, attorney, or proxy. Hence only those creditors whose claims are provable in bankruptcy are included. The claims which are provable are set out in the sixty-third section of the act. The bankrupt himself, as fiduciary, can prove a claim against his estate.[32]

Under the present act, secured creditors and those who have priority can prove their claims and participate in the meeting, but only for such part of their debt as is not covered by their securities. And "secured creditors," in this sense, mean creditors secured by the bankrupt, not creditors secured by claims against other parties. For instance, where a creditor had a judgment against the bankrupt and another,

[31] 172 U. S. 660, 18 Sup. Ct. vii, 43 L. Ed. 1192.

[32] Warner v. Spooner (C. C.) 3 Fed. 890.

and levied on the property of the other as well, he could still prove his claim against the bankrupt.[33] And so a partner who has bought up judgments against the firm can prove against the estate of an individual partner, though, of course, not in such a manner as to come into competition with partnership debts on which he himself would be responsible.[34]

Under section 57g of the act as first passed, the claims of creditors who have received preferences could not be allowed unless such creditors surrendered their preferences. It will appear hereafter, in discussing the question what preferences are voidable, that a transfer or other method of preference adopted by the bankrupt may be a preference as to him, and yet may be valid as to the party preferred, if the latter did not have reasonable cause to believe that it was intended as a preference. Hence care must be taken, in this connection, to distinguish between preferences voidable even as to the creditor, and preferences valid as to him, and yet against the bankrupt law. The idea of the bankrupt law is equality of distribution of the assets among the creditors, as far as it is possible to bring about that equality without interfering with freedom of alienation in ordinary business transactions. Hence this provision of the bankrupt law was intended to put the creditor to his election. He had to choose between holding on to his preference, or giving up his hope of dividends from the bankrupt's estate. He could not claim his preference, and still insist on his dividend. Hence, under the act, as first passed, even a creditor whose preference could not be set aside had to surrender it before he could participate in the benefits of the act.[35] And Judge Lowell held that even a preference which could not be set aside for the reason

[33] In re Headley (D. C.) 97 Fed. 765.

[34] In re Carmichael (D. C.) 96 Fed. 594.

[35] In re Ft. Wayne Electric Corp. (D. C.) 96 Fed. 803; Id., 99 Fed. 400, 39 C. C. A. 582; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171.

that it had been made for more than four months had to be surrendered before the creditor could prove his claim.[36] In other words, under the original act, if the result of a payment or transfer was a preference, that preference had to be surrendered before the creditor could claim under the bankruptcy proceeding. However, the amendment of February 5, 1903, changed section 57g of the original act so as to provide that the claims of creditors who have received preferences voidable under section 60, subd. "b," or to whom conveyances, transfers, assignments or incumbrances, void or voidable under section 67, subd. "e," have been made or given, shall not be allowed, unless such creditors shall surrender such preference, conveyances, transfers, assignments, or incumbrances. This amendment was evidently intended to change these decisions, and to allow creditors who had received a preference innocently to still hold on to their preference and prove their claim. For it must be remembered that the receipt of a preference is not considered as an actual fraud.[37] Here, too, the preference contemplated is a preference by the bankrupt. A payment to the creditor by a third party is not a preference.[38]

There have been quite a number of decisions on the question whether payments on running accounts constitute a preference or not. It will appear, as the result of the authorities, that where there is an account current, with goods being bought and payments being made right along, payments on running accounts which do not substantially diminish the debtor's assets and are substantially covered by additional purchases are not preferences, but payments which do substantially diminish the assets are preferences.[39]

[36] In re Jones (D. C.) 110 Fed. 736. But compare In re Chaplin, 115 Fed. 162, 171.

[37] Streeter v. Bank, 147 U. S. 36, 13 Sup. Ct. 236, 37 L. Ed. 68.

[38] Dresser v. Lumber Co. (D. C.) 119 Fed. 531.

[39] Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; JAQUITH v. ALDEN, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717.

Paragraph "i" of section 57 permits parties liable to the creditor secondarily to the bankrupt to prove the claim in the creditor's name, and be subrogated to his rights, if the creditor fails to prove it. However, when there is only a part payment, the claim cannot be proved by the surety, but must be proved by the creditor.[40] And in such case the surety stands in the shoes of the creditor, and can only prove the claim if the creditor could, so that, if the creditor is prevented by a preference from proving his claim, the surety cannot prove it.[41]

Under this section a partner who had sold out his interest in the firm under an agreement that the remaining partner should assume all the firm debts, and who has been held liable for one of these debts, practically occupies the position of surety, and can prove such a claim, though not so as to come into competition with debts for which he might personally be liable.[42]

The Debts Provable against a Bankrupt's Estate.

All debts which are in existence as of the date of filing the petition are provable against the estate.[43] The debts provable are enumerated [44] as those which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as are not payable and did not bear interest. Under this clause the right to prove a debt depends upon its nature, and not upon the probability of realizing anything out of it.[45]

[40] In re Heyman (D. C.) 95 Fed. 800.

[41] In re Schmechel Cloak & Suit Co. (D. C.) 104 Fed. 64.

[42] In re Dillon (D. C.) 100 Fed. 627.

[43] In re Burka (D. C.) 104 Fed. 326; In re Swift, 112 Fed. 315, 50 C. C. A. 264.

[44] Section 63.

[45] In re Bates (D. C.) 100 Fed. 263.

There is a conflict of decisions whether a judgment in a state court for a fine in a criminal case comes under this section or not. District Judge Jackson, of West Virginia, has held that it comes within the terms of this clause and is provable.[46] On the other hand, District Judge Evans, of Kentucky, has held that such a debt is not provable; going on the theory that, if provable, it is barred by a discharge, and that it could not have been the intent of Congress to practically confer upon any one but the state officials what would be substantially a pardoning power.[47] Notwithstanding the force of this objection, such a debt would certainly come under the language of this clause, as being a fixed liability evidenced by a judgment; and, when the language of the act is so clear, it would hardly seem necessary to go outside of its language.

A liability which is in existence at the time of the filing of the petition and becomes fixed thereafter can be proved, provided it is done within the one year allowed for proof of claims.[48]

In the case of an agreement by a party to pay an annuity, a given penalty being fixed in the agreement, the holder of the annuity can prove this as a debt to the amount of the penalty if the annuity calculated on the usual life tables equals or exceeds the penalty.[49]

In case of a nonnegotiable instrument which has been assigned, the assignee merely stands in the shoes of the assignor, and can only prove for such an amount as the assignor could prove.[50]

A claim for alimony based upon a decree allowing it is not provable against the estate. It is not supposed to arise

[46] In re Alderson (D. C.) 98 Fed. 588.

[47] In re Moore (D. C.) 111 Fed. 145.

[48] In re Gerson (D. C.) 105 Fed. 891; Moch v. Bank, 107 Fed. 897, 47 C. C. A. 49.

[49] Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369.

[50] In re Wiener & Goodman Shoe Co. (D. C.) 96 Fed. 949.

out of contract, and it is not a fixed liability in the sense of the statute.[51]

The next largest class of debts enumerated are those founded upon a contract, express or implied. A claim founded upon a contract must, however, at least be certain. For instance, a claim for breach of warranty due to an outstanding dower interest, when both husband and wife are still living, is too contingent to be made the subject of a provable claim, though a claim for breach of warranty actually matured is not.[52]

The fifth subdivision of this paragraph allows provable debts to be reduced to judgment after the filing of the petition, and before the consideration of an application for a discharge. The effect of a judgment, however, is not to create any lien, but simply to establish the debt.[53] Hence under this act the mere suggestion of bankruptcy is not sufficient to stop proceedings in a state court on a provable claim, as such claim can still be prosecuted to judgment.

The last clause of the sixty-third section provides that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct. For this reason an unliquidated claim cannot be the basis of a proceeding in involuntary bankruptcy, as it cannot be liquidated until the court directs, and the court cannot give any directions until some valid bankruptcy proceeding has already been instituted.[54]

Under this provision, claims arising out of contract, whose amount is not fixed, must be liquidated under the direction of

[51] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 48 L. Ed. 1009. See, also, Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

[52] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232; In re Morales (D. C.) 105 Fed. 761. See, also, Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

[53] In re McBryde (D. C.) 99 Fed. 686.

[54] In re Brinckmann (D. C.) 103 Fed. 65; In re Morales (D. C.) 105 Fed. 761.

the court. Where the result of bankruptcy is to put an end to a continuing contract, damages for failing to complete such an executory contract up to the date of filing the petition can be proved.[55]

Damages arising out of a tort—as, for instance, an assault and battery—must be liquidated before they can be proved, if they are provable at all.[56]

Damages are so provable if they arise out of contract, even though the form of the action may be ex delicto. For instance, damages for a breach of contract of marriage are provable.[57]

But in the case of In re Hirschman,[58] District Judge Marshall decides that debts which are in their nature torts are not provable against the bankrupt's estate at all. He holds that the only debts provable are those named in section 63a of the act, all of which arise out of contract, in some form or another, and that the concluding clause of that same section, allowing the liquidation of unliquidated claims, simply refers to the claims provable under the first section, and is not intended to enlarge the list of debts which could be proved beyond those enumerated in the first section.

Debt Barred by Statute of Limitations.

There has been a good deal of discussion, both under the former act and the present one, as to the circumstances under which a debt barred by the statute of limitations may be proved. It may be considered settled by the preponderance of authority, at least, that the bar of the limitation is applied as of the district of the debtor's residence at the time of adjudication.[59] And the better opinion, also, is that, if not barred at

[55] In re Silverman (D. C.) 101 Fed. 219; In re Stern, 116 Fed. 604, 54 C. C. A. 60.

[56] In re Hirschman (D. C.) 104 Fed. 69.

[57] In re McCauley (D. C.) 101 Fed. 223; In re Fife (D. C.) 109 Fed. 880.

[58] (D. C.) 104 Fed. 69.

[59] In re Noesen, Fed. Cas. No. 10,288; In re Cornwall, Fed. Cas. No. 3,250.

the date of adjudication, it cannot be barred at all during the pendency of the proceedings—in other words, the filing of a proceeding in bankruptcy stops the running of the statute.[60] It is well settled, also, that, although the plea of the statute of limitations is usually a personal plea, yet, in a bankruptcy proceeding, where creditors are equally interested, any creditor may plead it, or may require the trustee to plead it. And the insertion of the barred debt in the bankrupt's petition does not revive it.[61]

In spite of the language of the authorities, however, it is difficult to understand why a debt barred by the statute of limitations is not a provable debt. It would seem, on principle, that this would depend on the policy of the special statute which was under consideration. In some states the statute of limitations destroys both the contract and the remedy; in others, it merely takes away the remedy, and the debt remains a debt which is enforceable, or not, according to the question whether any plea of the statute is interposed or not.

Hence in many of the states the defense of the statute cannot be raised by demurrer, but must be pleaded specially. In Virginia, for instance, the statute must be the subject of a special plea, and cannot be raised by demurrer, for the reason that there certainly is a cause of action, and whether the debtor chooses to set up the bar, or not, is a matter of defense. As the provability of a debt depends not upon the question of the likelihood of recovery, but upon its existence, it would seem that in suits of this sort it could be proved, and would have to be taken notice of, unless either the bankrupt, a creditor, or the trustee should plead the statute. The question, however, is hardly a practical one,

[60] In re Wright, Fed. Cas. No. 18,068; In re Eldridge, Fed. Cas. No. 4,331.

[61] In re Lipman (D. C.) 94 Fed. 353; In re Resler (D. C.) 95 Fed. 804; In re Lafferty (D. C.) 122 Fed. 558.

since they would be almost certain to plead the statute in every case.

THE EXAMINATION OF THE BANKRUPT.

57. The law requires the bankrupt to submit to an examination as to any matters which may affect the administration and settlement of his estate.

Section 7 of the bankrupt law requires the bankrupt to attend the first meeting of his creditors, if directed by a court or judge so to do, and, when present, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. It also provides that his testimony given in such an examination cannot be used against him in any criminal proceedings, and further that he cannot be required to attend beyond a given distance unless provision is made for the payment of his expenses. This examination is one of the most important matters that can come before the first meeting of the creditors. The fifty-eighth section entitles creditors to ten days' notice of all examinations of the bankrupt, though the general notice as to the first meeting is so worded as to give this requisite notice.

The bankrupt is not only required to submit to an examination at the first meeting, but at other meetings, provided the necessary notices are given, and provision as to expenses, etc., carried out. As he alone can give the information almost essential to the proper management of the bankrupt estate, the ninth section of the act provides a method of holding him to bail, or under a modified form of custody upon satisfactory proof that he is about to leave the district to avoid examination, and that his departure will defeat the proceedings in bankruptcy.

In the case of In re Lipke [62] it was held that this ninth section of the act was not exclusive in its provisions as to requiring the attendance of the bankrupt, but that, under subdivision 15 of the second section, which gives the courts a right to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of a provision of this act, a writ in the nature of ne exeat may be issued to prevent the bankrupt from leaving the district, even in cases not covered by the ninth section.

When the bankrupt is present for examination, creditors whose claims are in the list, even though their debts are not proved, are entitled to examine.[63] When the examination is under way, it has been held that a voluntary bankrupt cannot refuse to give up papers or necessary documents on the ground that they might incriminate him or might be used against him in criminal proceedings; it being held that the filing of a voluntary petition is a waiver of the constitutional provision protecting a man from self-incrimination.[64]

It has also been held that a bankrupt cannot refuse to be sworn at the outset of the examination on the ground that it might incriminate him, but that he can claim the constitutional provision during the examination whenever a question is asked that might incriminate him. And in this same case it was held, also, in accordance with the great weight of decisions on that subject, that the provision in the seventh section to the effect that the bankrupt's testimony should not be offered against him in any criminal proceedings was not as extensive a protection as the constitutional provision against self-crimination; implying that, where his answers might give information that would lead to a better preparation of a

[62] (D. C.) 98 Fed. 970.
[63] In re Jehu (D. C.) 94 Fed. 638; In re Walker (D. C.) 96 Fed. 550.
[64] In re Sapiro (D. C.) 92 Fed. 340.

criminal case against him, he was protected by the constitutional provision, and could not be required to answer.[65]

The examination of the bankrupt may go into transactions more than four months old, if pertinent in explaining transactions less than four months old.[66]

The twenty-first section of the act as originally passed permitted the examination not only of the bankrupt, but of any designated person, concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration, provided that designated person was a competent witness under the laws of the state in which the proceeding was pending. Under this provision the wife of the bankrupt could be examined if she was a competent witness under the laws of the state; otherwise not. And her examination as to property in her possession, if reasonably pertinent, might also go back of four months.[67]

This twenty-first section of the act, however, has been amended by the act of February 5, 1903, so as to read as follows: "Sec. 21. (a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

Under this amendment the wife is made a competent witness irrespective of the provisions of the state law.

[65] In re Scott (D. C.) 95 Fed. 815; In re Levin (D. C.) 131 Fed. 388.
[66] In re Brundage (D. C.) 100 Fed. 613.
[67] In re Foerst (D. C.) 93 Fed. 190; In re Mayer (D. C.) 97 Fed. 328.

CHAPTER VII.

THE DISTRICT COURT (Continued)—BANKRUPTCY (Continued).

58. The Trustee.
59. The Title of the Trustee.
60. The Trustee's Duties of Administration—Recordation of Decree of Adjudication.
61. Same—The Collection of the Assets.
62. Same—Trustee's Rights against Parties Claiming Adversely under Alleged Void Transfers, etc.
63. Same—The Circumstances Avoiding an Alleged Illegal Transfer.
64. Same—Same—Insolvency.
65. The Trustee's Interest in Insurance Policies.
66. The Trustee's Interest in Rights of Action.
67. The Trustee's Power of Sale.
68. The Trustee's Duties as to Distribution of the Estate.
69. The Trustee's Duties as to the Bankrupt's Exemptions.

THE TRUSTEE.

58. The election of a trustee is part of the business of the first creditors' meeting. The forty-fourth section of the act vests the right to select a trustee or trustees in the creditors, except that, if the creditors do not appoint a trustee or trustees, the court shall do so. And the seventeenth subdivision of the second section also gives the court the right to appoint trustees pursuant to the recommendation of creditors, or where they neglect to recommend the appointment of trustees.

In voting on the election of a trustee and other matters coming before the creditors' meeting, the fifty-sixth section of the act provides that a majority vote, in number and amount, of all creditors whose claims have been allowed and are present, shall be necessary to pass upon any matter before the meeting. Under this provision, all creditors are counted whose claims have been allowed and who are present in per-

son or by duly authorized attorney. If, for the purpose of voting, the attorney's proxy is defective, or he has no proxy at all, and on that ground cannot vote, the creditor is not present.[1]

A general representation of a creditor as attorney is not sufficient to give him a vote. The attorney must have an express written proxy.[2]

The election of a trustee is subject to approval by the referee or judge, but this power of approval does not confer the power to set aside the choice of the creditors and name a trustee not chosen by the creditors. The effect of the veto is to necessitate another election. It is only when the creditors fail to make any appointment that the referee or judge can act.[3]

The trustee is required by section 45 to be some individual competent to perform the duties, and a resident of the judicial district wherein he is appointed, or a corporation authorized by its charter to act as such; and he is required by the fiftieth section of the act to give bond for the faithful performance of his official duties.

THE TITLE OF THE TRUSTEE.

59. The trustee's title vests as of the date of the adjudication, under the express provisions of section 70 of the act. But although his title vests as of that date, it covers all property owned by the bankrupt at the date of filing the petition, including in this all property which has been illegally assigned.

The title of the trustee is the usual title of a statutory assignee. It is not the title, by any means, of an innocent holder

[1] In re Henschel (D. C.) 109 Fed. 861; Id., 113 Fed. 443, 51 C. C. A. 277.

[2] In re Scully (D. C.) 108 Fed. 372; In re Lazoris (D. C.) 120 Fed. 716.

[3] In re Lewensohn (D. C.) 98 Fed. 576; In re Hare (D. C.) 119 Fed. 246.

of negotiable paper. He acquires the bankrupt's interest when that is such an interest as would be good against the bankrupt's creditors. For instance, under the mechanic lien laws of the different states, some of these liens relate back to the date of commencing the work; others, only to the date of giving the notice. If, therefore, work has been done which would be the subject of a lien from the inception of the work, the trustee would take the property subject to that lien. If, on the other hand, the lien dated only from the giving of the notice, and that notice had not been given at the commencement of proceedings, the trustee takes the property clear of the lien.[4]

On the other hand, any liens or charges that would be void as against the bankrupt and his creditors are voidable by the trustee; and, conversely, any which are good as against the creditors of the bankrupt are good against the trustee.[5] It may very well be, however, that, even where it eventually turns out that the transaction is valid, yet, for the purpose of administering the bankrupt estate, the court would have jurisdiction of any property in the possession of the bankrupt, or to which the trustee might claim a color of title. In other words, under the seventh subdivision of section 2, the estate to be administered by the court may be more extensive than the property which would on full investigation finally pass to the trustee.[6]

The mere fact, however, that certain property is in the personal custody of the bankrupt, does not necessarily subject it to the control of the trustee. For instance, property that the bankrupt might hold in trust, and that is so ear-

[4] In re Coulter, Fed. Cas. No. 3,276; In re Roeber, 121 Fed. 449, 57 C. C. A. 565; In re Laird, 109 Fed. 550, 48 C. C. A. 538.

[5] NORTON v. HOOD, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364; In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133; Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261.

[6] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461.

marked as to be capable of identification, would not pass to the assignee.[7]

While the title of the trustee dates from the adjudication, the property which vests in him dates as of the day of filing the petition.[8]

Character of Property Which Vests in Trustee.

The character of the property which vests in him is defined in the seventieth section of the act. The two most general classes named in that section are the fourth and fifth, which are property transferred by the bankrupt in fraud of his creditors, and property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. This last section has been held to have a very extensive meaning. A seat in a stock exchange which could be transferred vests in the trustee, even though the transfer is so uncertain that it requires the consent of certain authorities of the exchange.[9]

Under the act of 1867 it was held that a claim to share in the sum paid to the United States under the Geneva award on account of the Alabama captures vested in the assignee, who was the officer corresponding to the trustee under the present act.[10]

Under this clause the property transferred by the bankrupt in fraud of his creditors includes any property which could be recovered by the trustee on any of the other grounds specified in the act.

For instance, it includes property recoverable under the clause defining illegal transfers. This is covered by the sixtieth section of the act. In its original form, it provided that a person should be deemed to have given a preference, if, being

[7] Hosmer v. Jewett, Fed. Cas. No. 6,713.

[8] In re Garcewich, 115 Fed. 87, 53 C. C. A. 510; NORTON v. HOOD, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364.

[9] PAGE v. EDMUNDS, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318.

[10] Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550.

insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. And paragraph "b" of the same act provided that if the bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

These two paragraphs have been very materially changed by the amendment of February 5, 1903, so that they now read as follows:

"Sec. 60 (a). A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

"(b) If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such

recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Where the preference is in the creation of liens, it is covered by the sixty-seventh section of the act. This section has not been changed by the act of February 5, 1903, except that to paragraph "e" has been added a sentence conferring upon the bankruptcy court concurrent jurisdiction with the state court which would have had jurisdiction if bankruptcy had not intervened in recovering property illegally transferred.

In order to constitute an illegal preference, actual value must pass. Book entries intended to have that purpose, but which are frustrated and create no harm, are not of themselves preferences.[11] Nor is it a preference to pay claims on account of a dower interest which is a valid charge upon the property.[12]

An assignment for creditors is also a preference, and even where the state law provides that, in the administration of assignments, all claims for wages shall be preferred, that preference falls with it. The priorities claimed by the bankrupt law are exclusive in such case, and, where a priority is given by a state law, not in the nature of a lien on the property, but simply in the nature of a direction to an assignee in a general assignment to pay the same prior to other claims, such claims cannot be so treated if their priority arises by virtue of making a deed of assignment which is itself voidable.[13]

It is not, however, a preference where a debt is paid in full, and then a new bill sold. In such case the new bill constitutes a new transaction, and the creditor does not even have to surrender his prior payment.[14]

Under paragraph "d" of the sixty-seventh section, liens cre-

[11] In re Steam Vehicle Co. of America (D. C.) 121 Fed. 939.

[12] In re Riddle's Sons (D. C.) 122 Fed. 559.

[13] In re Slomka, 122 Fed. 630, 58 C. C. A. 322.

[14] In re Wolf & Levy (D. C.) 122 Fed. 127; JAQUITH v. ALDEN, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717.

ated for a present consideration, and properly recorded, where record is necessary, and free from fraud, are upheld, although the bankrupt at the time of the creation of the lien is insolvent. And where a mortgage covers such a debt, and also an old debt which is against the act, it will be upheld to the extent of the valid debt.[15]

Under the provision setting aside conveyances intended to hinder, delay, and defraud, such a conveyance may be attacked as violating the ordinary state statutes based upon the statute of 13 Elizabeth, even though it could not be attacked under the illegal preference provision of the bankrupt act.[16]

Paragraph "f" of the sixty-seventh section avoids all liens acquired in invitum within four months prior to the filing of the petition in bankruptcy. Under this section, if the lien was in existence more than four months prior, the mere fact that it was consummated by a judgment or attempted to be enforced by execution after the four months did not avoid it. If, on the other hand, an execution had been levied and the property sold under it, the purchaser, if innocent of fraud, acquired a good title; and the money, if the lien was void, would go to the trustee, or, if valid, would go to the execution creditor. So that the question of the lien on an execution is not so important as the question of the lien of the judgment. If the judgment is more than four months old, it is valid, even though the execution is issued within the four months. If the judgment is less than four months old, it is invalid, and the execution upon it is also invalid.[17]

[15] City Nat. Bank of Greenville v. Bruce, 109 Fed. 69, 48 C. C. A. 236; In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476; Young v. Upson (C. C.) 115 Fed. 192; In re Hull (D. C.) 115 Fed. 858; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669.

[16] Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429.

[17] In re Franks (D. C.) 95 Fed. 635; In re Kenney (D. C.) 95 Fed. 427; In re Breslauer (D. C.) 121 Fed. 910; Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Owen v. Brown, 120 Fed. 812, 57 C. C. A. 180.

Even if the lien is simply a lien acquired by the filing of a creditors' bill, and subject to the contingencies of such a suit, it is valid, if finally upheld on the merits, provided it has been acquired more than four months before the filing of the proceedings in bankruptcy.[18]

THE TRUSTEE'S DUTIES OF ADMINISTRATION—RECORDATION OF DECREE OF ADJUDICATION.

60. The trustee is required, within thirty days after the adjudication, to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution.

The forty-seventh section of the act sets out the trustee's duties in connection with the management of the estate. A very important addition to the original section has been made by the act of February 5, 1903. It provides that the trustee shall within thirty days after the adjudication file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing. The importance of this as a link in the chain of title of the bankrupt's estate is very great.

SAME—THE COLLECTION OF THE ASSETS.

61. It is the trustee's duty to collect the assets of the bankrupt estate.

If the bankrupt himself does not turn over the proper books or other papers, the trustee may institute contempt proceedings to compel him to do so.[19] As to any property in the

[18] METCALF v. BARKER, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

[19] In re Wilson (D. C.) 116 Fed. 419.

hands of parties not asserting adverse claim thereto he may proceed summarily in the bankruptcy court itself.[20] Nor is a party an adverse claimant merely because he refuses to surrender property. If he sets up an adverse claim, and the pleading which sets it up shows on its face no title, then the bankruptcy court has jurisdiction to decide whether he is an adverse claimant, or not, and to proceed accordingly. For instance, if the party asserts a lien by attachment, which, upon his own claim, is avoidable under the provisions of the bankrupt law, he is not an adverse claimant. In order to make him such, he must claim a right to hold the property under a bona fide colorable claim of title. For instance, a surety on a bail bond of the bankrupt, with whom the bankrupt had deposited money to protect his interests, and who held it for that purpose, is an adverse claimant.[21] So, too, a party claiming property alleged to be fraudulently conveyed, where the question whether the conveyance was fraudulent or not was a matter of fact, and could not necessarily be settled by an inspection of the pleadings themselves, is an adverse claimant.[22] Under this principle, an assignee in a deed of general assignment is not an adverse claimant, and can be proceeded against summarily, for that is an act of bankruptcy of itself, and is a matter of law, which the assignee must know, and therefore for which he cannot assert a colorable adverse claim.[23]

[20] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Breslauer (D. C.) 121 Fed. 910.

[21] Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620.

[22] In re Hartman (D. C.) 121 Fed. 940.

[23] BRYAN v BERNHEIMER, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Thompson (D. C.) 122 Fed. 174.

SAME—TRUSTEE'S RIGHTS AGAINST PARTIES CLAIMING ADVERSELY UNDER ALLEGED VOID TRANSFERS, ETC.

62. The right to avoid transfers or illegal preferences under the bankruptcy act is vested in the trustee alone. Creditors of the bankrupt cannot proceed in their own names, even though they allege that they have applied to the trustee and that he has refused to proceed, for the bankruptcy act makes him the sole judge of the propriety of such procedure.[24]

The usual remedy resorted to for the purpose of avoiding transfers forbidden by the act is a bill in equity in the name of the trustee.[25]

Under section 23 of the original act, it is settled by repeated decisions in the United States Supreme Court that the federal courts did not have jurisdiction over such suits, unless they would have had jurisdiction of the controversy in case bankruptcy proceedings had not been instituted, and the controversy had been between the bankrupt and adverse claimants.[26]

The effect of these decisions was to take away from the federal courts all but their mere administrative jurisdiction, and to relegate to the state courts the most important class of controversies which arise under the bankrupt act. The amendment of February 5, 1903, was carefully drawn to restore this necessary jurisdiction to the federal courts. It accomplished this by making section 23b read as follows, the added portion be-

[24] GLENNY v. LANGDON, 98 U. S. 20, 25 L. Ed. 43; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Bankr. Act, § 70e.

[25] Cox v. Wall (D. C.) 99 Fed. 546; Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408; Id., 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845 (although the decision of the lower court was reversed in the Supreme Court on the question of jurisdiction of the federal courts, it was not reversed on the question of the remedy); Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Harmanson v. Bain, Fed. Cas. No. 6,072.

[26] Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620.

ing in italics: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section* 60, *subdivision 'b,' and section* 67, *subdivision 'e.'*"

It also added to section 60, par. "b" (the section avoiding illegal preferences), to section 67e (the section avoiding conveyances made to hinder, delay, and defraud), and to section 70e (the section authorizing the trustee to avoid illegal transfers) the following words: "For the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Under section 1, subd. 8, courts of bankruptcy are defined as including the district courts of the United States, and the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska. Hence, under this amendment, these federal courts would have concurrent jurisdiction with the state courts over such controversies.

It will be observed that the United States circuit court is not mentioned among the courts of bankruptcy. It would not have jurisdiction, therefore, unless under the general laws defining the jurisdiction of the circuit courts, or under the provisions of section 23 of the act. If, however, the citizenship of the parties and the other requisites of jurisdiction as to amount involved, etc., are proper, the circuit court would have jurisdiction of such controversies on that ground. So, also, it would have jurisdiction if a federal question—that is, a question arising under the constitution and laws of the United States—was involved. In order to have jurisdiction on the ground of a federal question, however, the fact that the case arises under the Constitution and laws of the United States must appear from the plaintiff's own statement of his case; and it must

not merely appear that such a question is involved, but that the plaintiff bases his right on the question.[27]

In any suit by a trustee to set aside an illegal preference on the ground that it violated the bankrupt act, this would also necessarily appear, and it would therefore seem that on that ground the circuit court also would have jurisdiction.

In a suit by the trustee to set aside an alleged illegal transfer, the bankrupt is not a necessary party, as he no longer has any interest in the result.[28]

SAME—THE CIRCUMSTANCES AVOIDING AN ALLEGED ILLEGAL TRANSFER.

63. The circumstances which will avoid an alleged illegal transfer are

(1) that the bankrupt must be insolvent, and

(2) that the party benefited must have had reasonable cause to believe that the bankrupt was insolvent, and that he intended to violate the provisions of the act.

Under the provisions of sections 60 and 67, a suit to avoid an illegal preference is not sustainable unless the bankrupt is insolvent, and unless the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, or, in the case of liens, that the party had reasonable cause to believe that the defendant was insolvent and in contemplation of bankruptcy, or that the lien was sought and permitted in fraud of the provisions of the act. This applies simply to these two methods of creating an illegal preference. As to suits to set aside a conveyance with intent to hinder, delay, or defraud creditors, based on statutes similar to the statute of 13 Elizabeth, they are void, except as to purchasers in good faith, and for present, fair consideration.

[27] Boston & Montana Consol. Copper & Silver Min. Co. v. Purchasing Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.

[28] Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381.

In reference to preferences, therefore, two requisites must concur before the trustee can hope to recover: First, the bankrupt must be insolvent; and, second, the transferee must have had reasonable cause to believe he intended to give a preference, which involves reasonable cause to believe that he was insolvent, or, as to liens, that he was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the provisions of the act. Substantially, therefore, the bankrupt must, in the first place, be insolvent; and, in the second place, the party benefited must have reasonable cause to believe that he was insolvent, and that he intended to violate the provisions of the act.

SAME—SAME—INSOLVENCY.

64. A party is deemed insolvent, under the provisions of the first section of the act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.

This marks a radical and far-reaching distinction between the present act and the act of 1867. Under the latter act a party was insolvent when he was unable to meet his debts as they accrued. Under the present act, if his property is sufficient to pay his debts, he is solvent, even though he may go to protest and fail to provide for their payment. This is true even as to the bankrupt himself, in passing upon the question whether he has committed those acts of bankruptcy which involve insolvency as an essential element.[29]

This meaning of insolvency is so different from its usual meaning in the law that even the appointment of a receiver on the ground of insolvency under a state statute, where the word has its old meaning, does not prove insolvency under the

[29] In re Rogers' Milling Co. (D. C.) 102 Fed. 687.

bankrupt act with its present meaning. If a fair estimate shows an excess of assets over liabilities, the bankrupt is not insolvent.[30]

Nor does any presumption of the existence of insolvency arise from the making of an adjudication in bankruptcy, nor from the want of ready money to pay debts.[31]

And in determining the value of property, it is estimated on the theory of a fair appraisement, and not necessarily on the price that a purchaser would give who tried to take advantage of the bankrupt's situation.[32]

A partnership is solvent if the individual and firm assets together exceed the liabilities.[33]

But even if the bankrupt is insolvent, the transaction will still hold, unless the party benefited had reasonable cause to believe that he was insolvent, and that he intended to violate the act. Here, too, the decisions under the former act must be used with great caution. Where insolvency consists in an inability to meet obligations as they mature, many circumstances of suspicion might be brought home to the party benefited that would be entitled to but little weight under the meaning of the word in the present statute. Even under the former act mere suspicion that the bankrupt was in trouble, or knowledge that he was slow in paying his debts, was not sufficient to bring such knowledge home to the party benefited. Under the present act a much stronger train of circumstances would be necessary, for, as has been seen above, a party embarrassed might even go to protest, and still be solvent. An interesting discussion of the meaning of insolvency under the present act, as compared with the old act, is contained in the case of In re Eggert,[34] though that decision apparently gives more

[30] In re Doscher (D. C.) 120 Fed. 408.

[31] In re Chappell (D. C.) 113 Fed. 545.

[32] Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666.

[33] Davis v. Stevens (D. C.) 104 Fed. 235.

[34] IN RE EGGERT (D. C.) 98 Fed. 843, Id., 102 Fed. 735, 43 C. C. A. 1.

weight to the cases under the old act than they ought to have, and does not sufficiently emphasize the difference between the two acts. So, too, the knowledge by the party benefited of the existence of certain indebtedness on the part of the bankrupt is not of itself sufficient, for it must be remembered that the interests of the commercial world demand freedom of alienation just as much as they demand the enforcement of the provisions of the bankrupt act.

THE TRUSTEE'S INTEREST IN INSURANCE POLICIES.

65. The trustee is entitled to any insurance policy payable to the bankrupt which has a cash surrender or an actual value, unless the bankrupt chooses to redeem such policy.

Under section 70 the trustee is entitled to any insurance policy in the name of the bankrupt which has a cash surrender value and is payable to the bankrupt, unless the bankrupt chooses to redeem the policy. It has been held, however, that the trustee is also entitled to any insurance policy payable to the bankrupt that has an actual value, even though it has no cash surrender value, because such a policy is property, and passes under the previous clauses of the same section.[35]

THE TRUSTEE'S INTEREST IN RIGHTS OF ACTION.

66. The trustee is entitled to all rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, the bankrupt's property.

The seventieth section of the act provides that the trustee shall be entitled to all rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, the

[35] In re Welling, 113 Fed. 189, 51 C. C. A. 151; In re Holden, 114 Fed. 650, 52 C. C. A. 346.

bankrupt's property. Under this provision it is clear that the trustee does not become entitled to the bankrupt's right of action for torts to the person—for instance, to rights of action for slander or malicious prosecution.[86]

THE TRUSTEE'S POWER OF SALE.

67. The trustee has the power to hold a sale after due notice to all parties in interest, which, however, is subject to affirmation by the court. The sale may be a public or private one, according to circumstances.

This power is necessarily implied in the right given by the forty-seventh section of the act to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court. Under the fifty-eighth section, creditors are entitled to notice of all proposed sales of property; and, after the property is sold, the court has a general supervision over the question whether to confirm the sale or not, and exercises it under the ordinary principles governing judicial sales, but will not set aside a sale merely because a somewhat better price could be obtained, though it will set it aside if improperly conducted, even though the purchaser was not himself guilty of any impropriety.[87]

The eighteenth bankruptcy order [88] requires sales to be at public auction, unless otherwise ordered, but permits private sales under certain circumstances.

There is no express provision in the present act authorizing the sale of property free of incumbrances. This was a common practice under the former act, and the courts deduce the right to order such sales under the present act from the necessity for prompt action, and the general powers conferred upon

[86] Dillard v. Collins, 25 Grat. (Va.) 343; In re Haensell (D. C.) 91 Fed. 355.

[87] In re Ethier (D. C.) 118 Fed. 107; In re Belden (D. C.) 120 Fed. 524; In re Shea (D. C.) 122 Fed. 742.

[88] 172 U. S. 659, 18 Sup. Ct. vi, 43 L. Ed. 1191.

them by the act. A sale may be ordered free from incumbrances even when it is not certain that there is no equity of redemption.[39]

But there must be at least some probability that it is to the interest of the general creditors, before such a sale will be ordered.[40]

Such a sale, however, cannot be ordered without giving notice to all parties in interest, and giving them a day in court.[41] Under some circumstances a sale may be ordered by the referee.[42]

THE TRUSTEE'S DUTIES AS TO DISTRIBUTION OF THE ESTATE.

68. It is the trustee's duty to distribute the estate in accordance with, and observance of, certain priorities prescribed by law.

In the distribution, certain priorities are prescribed by the sixty-fourth section of the act. The trustee must, of course, observe them. He must pay all taxes due to the United States or state, or any municipal subdivision thereof, before he can pay any dividend.

Debts Due the United States.

It is an interesting question, under the present act, whether debts due to the United States which are not taxes are a prior claim. Under the act of 1867 there was an express provision giving them priority.[43] The fact that this provision is omitted

[39] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461.

[40] In re Pittelkow (D. C.) 92 Fed. 901; Southern Loan & Trust Co. v. Benbow (D. C.) 96 Fed. 514; In re Shaeffer (D. C.) 105 Fed. 352.

[41] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; In re Pittelkow (D. C.) 92 Fed. 901.

[42] In re Sanborn (D. C.) 96 Fed. 551; In re Waterloo Organ Co. (D. C.) 118 Fed. 904.

[43] Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513.

in the present act, and only taxes due the United States mentioned as prior, might be taken as some evidence of an intent on the part of Congress to abolish that priority; but, on the other hand, the bankrupt law contains no section to the effect that its provisions are intended to be exclusive, and contains no clause of repeal of any other acts. Hence it would seem that section 3466 of the Revised Statutes,* which gives priority to the United States in the event of winding up an insolvent estate, is not affected by the bankrupt act, but, on the contrary, that the priority so given would be, in the language of the fifth subdivision, "debts owing to any person who by the laws of the state or the United States is entitled to priority." The ordinary principles of construction, which lean against excluding the sovereign from the benefits of statutes, would be applicable, and tend to strengthen the claim of the government to priority. Hence, even if the government did not prove its claim at all, no laches could be imputed to it, and it would be the duty of the trustee, if he knew of the claim, to pay it. This priority of the government, however, is not in the nature of a lien, and, if the trustee distributed the estate without knowledge of a governmental claim against the bankrupt, he could not be held accountable for doing so.

Under the first paragraph of the sixty-fourth section, the trustee must pay taxes even upon the property of the bankrupt exempt as a homestead.[44]

And there is no obligation upon the governmental organization to whom the taxes are due to prove its claim for taxes, but it is the duty of the trustee to pay them without such proof.[45]

Priority of Wages.

Another important priority given by the sixty-fourth section is wages due to workmen, clerks, or servants, which have been earned within three months before the date of the com-

* 2 U. S. Comp. St. 1901, p. 2314.

[44] In re Tilden (D. C.) 91 Fed. 500.

[45] In re Harvey (D. C.) 122 Fed. 745.

mencement of the proceedings, not to exceed $300 to each claimant. This provision is intended to cover the subject of priority of wages. The clerk or workman cannot claim priority for three months under this provision, and then for a greater time where the state law gives him a greater protection, even under the fifth subdivision, giving priority to debts owing to any person who by the laws of the states or the United States is entitled to priority. This last subdivision is not intended to extend the preceding subdivision relating to wages.[46]

This provision is intended to cover wages which have accrued in three months, whether they are actually due and payable or not.[47]

THE TRUSTEE'S DUTIES AS TO THE BANKRUPT'S EXEMPTIONS.

69. It is the trustee's duty to set apart all exemptions in favor of the bankrupt allowed by the state or federal law. It is then within the province of the bankruptcy court to allow or disallow said exemptions.

The bankrupt is entitled, under the sixth section of the act, to the exemptions allowed by the state laws; and, under the forty-seventh section, it is the trustee's duty to set the exemption apart and report his action to the court. And under the eleventh subdivision of the second section of the act, the court has power to determine all claims of bankrupts to their exemptions. Under this provision the court has power to consider the bankrupt's claim to exemption up to the point when it is finally set aside to him. Prior to that it has the right to say whether the bankrupt is entitled to certain property as exempt, or not. For instance, where the state law expressly provided that the bankrupt should not claim prop-

[46] In re Shaw (D. C.) 109 Fed. 782; In re Slomka, 122 Fed. 630, 58 C. C. A. 322.

[47] In re Gladding (D. C.) 120 Fed. 709.

erty as exempt against the purchase price, and the bankrupt set up a claim to such property, and the creditors came into the bankrupt court to resist the claim, the court has the power to pass upon it.[48] In fact, the bankrupt court has exclusive jurisdiction to determine the claim of the bankrupt to an exemption.[49] But when the exemption is once set aside to the bankrupt, it is no longer a part of the estate under the jurisdiction of the court, and then the court has no jurisdiction in controversies concerning it.[50] It cannot consider disputes in relation to it between the bankrupt and creditors who claim to hold obligations waiving it.[51]

[48] In re Boyd (D. G.) 120 Fed. 999.

[49] McGahan v. Anderson, 118 Fed. 115, 51 C. C. A. 92.

[50] In re Black (D. C.) 104 Fed. 289.

[51] LOCKWOOD v. BANK, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

CHAPTER VIII.

DISTRICT COURT (Continued)—BANKRUPTCY (Continued).

70. The Discharge—Application for.
71. Same—Method of Opposing.
72. Same—Burden of Proof.
73. Grounds of Opposition to Discharge.
74. The Debts Not Affected by a Discharge.
75. Revocation of a Discharge.

THE DISCHARGE—APPLICATION FOR.

70. The discharge is the release of the bankrupt from all of his indebtedness which the bankruptcy can affect. Application therefor may be made within certain limits as to time; and, upon notice to all parties in interest, and after a hearing granted the applicant and those who oppose the discharge, the same is granted or refused by the court.

The procedure relating to a discharge is regulated by section 14 of the act, as amended by the act of February 5, 1903. The application cannot be made until one month after the adjudication, and must be made within twelve months after it, though the judge may, under certain circumstances, allow six additional months.

Under section 58 the creditors are entitled to ten days' notice, by mail, of any hearing upon the application for the discharge. This notice must be by mail, and cannot be by publication—certainly not unless it is shown that the address of the creditor cannot be obtained.[1]

Corporations as well as individuals may ask for a discharge.[2]

Where a partnership has filed a petition in bankruptcy, the

[1] In re Dvorak (D. C.) 107 Fed. 76.
[2] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38.

individual partners may apply separately for a discharge, and do not have to join in such application.[3]

A bankrupt who applied for a discharge under the act of 1867 and was refused is not thereby precluded from applying under the act of 1898. The two acts are entirely dissimilar, and adjudications under the first would not be res judicata under the second. And this second application may be for a discharge from debts existing under the old act as well.[4]

The better opinion is that a bankrupt can apply for a discharge but once. He is then given his day in court and full opportunity to show his right to a discharge, and he cannot expect to relitigate the question.[5]

The parties entitled to oppose a discharge are, in the language of the act, "parties in interest." This includes a creditor whose name is in the bankrupt's list of creditors, although he has not proved his debt.[6]

A creditor who has appeared in a bankruptcy proceeding cannot oppose the discharge on the ground that the petition for bankruptcy was not filed in the right district. By appearing in the proceeding he waives any objections which merely affect the question of the personal jurisdiction of the court over the bankrupt.[7]

SAME—METHOD OF OPPOSING.

71. The method of opposing a discharge is by specifications filed by parties in interest, setting out the grounds of opposition with reasonable particularity, and giving such facts as will enable the bankrupt to defend himself. This raises the issues of law and fact, the statements of the specifications being presumed to be de-

[3] In re Meyers (D. C.) 97 Fed. 757.

[4] In re Herrman (D. C.) 102 Fed. 753; Id., 106 Fed. 987, 46 C. C. A. 77.

[5] In re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409. Contra: In re Olaff (D. C.) 111 Fed. 506.

[6] In re Frice (D. C.) 96 Fed. 611.

[7] In re Clisdell (D. C.) 101 Fed. 246.

nied by the bankrupt, and no further step is required of the bankrupt. He can raise legal questions by motion to dismiss.

The act requires the judge to hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest. Under this language the creditor must raise the question by formal specifications in opposition. These specifications must set out the grounds on which he opposes the discharge with reasonable particularity, giving such necessary facts in connection with the general charge as will enable the bankrupt to defend himself. The creditor cannot merely come in and follow the language of the statute defining the grounds of opposition to a bankrupt's discharge.[8]

But even if the specifications are vague and indefinite, the bankrupt cannot go to trial on them in the lower court, and raise this objection to them for the first time in the appellate court.[9]

The court may, in its discretion, allow the specifications to be amended so as to make them more definite, but it is not apt to exercise this discretion in this manner where the creditors have been guilty of laches.[10]

Where the creditor's specifications are filed, it is not necessary for the bankrupt to join any formal issue thereon. As far as the specifications raise questions of fact, they are presumed to be denied by the bankrupt, and his failure to file a formal paper denying them is not an admission of their validity, and would not authorize any default decree against him. So, too, as to questions of law, he need not file any paper in

[8] In re Goodale (D. C.) 109 Fed. 783; In re Peck (D. C.) 120 Fed. 972; In re Parish (D. C.) 122 Fed. 553.

[9] In re Osborne, 115 Fed. 1, 52 C. C. A. 595.

[10] Id.; In re Glass (D. C.) 119 Fed. 509; In re Carley, 117 Fed. 130, 55 C. C. A. 146; Kentucky Nat. Bank v. Carley, 121 Fed. 822, 58 C. C. A. 158.

the nature of a demurrer. He can raise the questions before the court on motion to dismiss.[11]

SAME—BURDEN OF PROOF.

72. The burden is upon creditors opposing a discharge to prove the facts necessary to defeat it by a preponderance of evidence clear and convincing.

There is some conflict of decisions as to the quantity of evidence necessary to prove the ground alleged as opposition to the discharge. There can be no question that the burden of proof in the first instance is upon the creditor opposing it. It has been held in some cases that a fair preponderance of evidence is all that is necessary in order to sustain this burden of proof.[12] On the other hand, it has been held, on much stronger reasoning, that, although the proof need not be such as to leave the matter beyond a reasonable doubt, it must be more than a mere preponderance, and must be clear and convincing.[13]

The grounds on which a discharge can be opposed are, in the main, grounds connected with the commission of a criminal offense, or the commission of some fraud. While the proceeding to show that a criminal offense has been committed as a means of defeating the discharge is not a criminal proceeding, it at least has the effect of fastening the commission of a crime upon the defendant. Hence it is not unreasonable to expect proof beyond that required in ordinary civil suits. The release of a debtor from a load of debt, and his restoration to the producing class of the community, are the fundamental reasons for the enactment of the bankrupt

[11] In re Logan (D. C.) 102 Fed. 876; In re Crist (D. C.) 116 Fed. 1007.

[12] In re Leslie (D. C.) 119 Fed. 406; In re Dauchy (D. C.) 122 Fed. 688.

[13] In re Corn (D. C.) 106 Fed. 143; In re Howden (D. C.) 111 Fed. 723; In re Greenberg (D. C.) 114 Fed. 773.

law, and therefore the presumptions ought to be in favor of his obtaining a discharge. Hence, while it might be too heavy a burden on the creditor to require the amount of proof necessary in criminal procedure, it certainly is not putting too much upon him to require a degree of proof equal to that required for the proof of fraud in ordinary civil proceedings, and hence the requirement that the proof must be clear and convincing would seem to be based upon sound reasons.

Policy as to Granting Discharge.

The policy of the bankrupt court is in favor of granting a discharge. The act contemplates a speedy discharge, and the court will not permit creditors to unreasonably delay it. Nor will the court go out of its way to find grounds for refusing it.[14]

Collateral Weight of Discharge.

A discharge is a personal privilege, like the statute of limitations; and therefore, when a creditor is sued, he must plead his discharge, or judgment will go against him, just as in any other uncontested case.[15]

When a discharge is pleaded, the court in which it is pleaded must assume that the proceedings upon it were regular, and that proper notices were given. It cannot be attacked collaterally.[16]

GROUNDS OF OPPOSITION TO DISCHARGE.

73. The general grounds of opposition to a discharge are, as prescribed by the statute:

(1) Commission of offenses against the bankruptcy act.

(2) Intentional destruction or concealment of, or failure to keep, accounts.

(3) Obtaining property on credit by false statement in writing for that purpose.

[14] In re Mudd (D. C.) 105 Fed. 348; In re Hixon (D. C.) 93 Fed. 440.

[15] Fowle v. Park (C. C.) 48 Fed. 789; In re Wesson (D. C.) 88 Fed. 855.

[16] Janecki Mfg. Co. v. McElwaine (C. C.) 107 Fed. 249.

(4) Removal, destruction, or concealment of property, with intent to hinder, delay, or defraud creditors, within four months previous to filing of petition.

(5) Prior discharge in bankruptcy within six years in case of voluntary proceedings.

(6) Refusal to obey lawful order of, or to answer any material question approved by, the court in the course of the bankruptcy proceedings.

These are set out in section 14 of the act, par. "b." As originally enacted, it read as follows:

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has (1) committed an offense punishable by imprisonment, as herein provided; or, (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained."

The act of February 5, 1903, has radically changed this section, not only in verbiage, but by the addition of several grounds not contained in the original act, so that it now reads as follows:

"(b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to

such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

In considering the grounds of opposition, it is important to remember the distinction between the right to a discharge and its effect when granted. The right to it is governed by the above-quoted section, and the only grounds of opposition are those therein contained. The fact that a discharge does not affect certain debts is not any reason why the holders of such debts should oppose it, as they are unaffected by it. For instance, the omission of creditors from the list, unless done intentionally, so as to make the swearing to the list a false oath, is no ground for refusing a discharge, because a discharge does not affect the right of such creditor to subsequently sue the bankrupt.[17] Nor is the existence of unprovable debts a ground for opposing the granting of a discharge, as such discharge, when granted, is no defense against them.[18]

Nor can the question of the effect of a discharge be considered on an application for it. Such questions will properly come up when the bankrupt pleads it in defense to a suit brought against him, but are not proper issues on an application to the court to obtain it.[19]

[17] In re Monroe (D. C.) 114 Fed. 398; In re Blalock (D. C.) 118 Fed. 679.

[18] In re Tinker (D. C.) 99 Fed. 79; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; In re Black (D. C.) 97 Fed. 493; In re Carmichael (D. C.) 96 Fed. 594.

[19] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38; In re McCarty (D. C.) 111 Fed. 151.

Commission of Offense as Ground of Opposition.

The first ground specified on which a discharge can be opposed is that the bankrupt "has committed an offense punishable by imprisonment as herein provided." The offenses against the bankrupt act are set out in section 29 of the act. In so far as they relate to the bankrupt himself, the first two named in paragraph "b" are practically the only ones which can be urged against a discharge. The first of these is, having knowingly and fraudulently concealed while a bankrupt, or, after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. Mere proof of the existence of property not reported by the bankrupt is not sufficient to defeat his discharge on this ground. It must be proved to have been knowingly and fraudulently concealed. It is not sufficient to prove simply former possession of the property by the bankrupt, but present ownership as well must be shown.[20]

The offense of fraudulent concealment may be proved from the bankrupt's statements on his examination, and those statements can be used against him for that purpose, as the proceeding is not a criminal proceeding.[21]

The second offense relating to the bankrupt is having knowingly and fraudulently made a false oath or account in or in relation to any proceeding in bankruptcy. This offense is committed when the bankrupt purposely omits property from his sworn schedules.[22]

It is not committed, however, by the omission of property from a mere mistake.[23]

[20] In re Idzall (D. C.) 96 Fed. 314; In re Patterson (D. C.) 121 Fed. 921.

[21] In re Leslie (D. C.) 119 Fed. 406.

[22] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158; In re Becker (D. C.) 106 Fed. 54; Id., 112 Fed. 1020, 50 C. C. A. 666; In re Semmel (D. C.) 118 Fed. 487.

[23] In re Morrow (D. C.) 97 Fed. 574; In re Freund (D. C.) 98 Fed. 81.

The failure to schedule property fraudulently transferred is a violation of the act in this respect.[24]

The omission of property from the schedules must be intentional and fraudulent, in order to constitute this offense.[25]

A false oath must be one material to the bankruptcy proceeding.[26]

Here, too, the offense may be proved, as far as the question of a discharge is concerned, by the bankrupt's statements in his examination, and they may be used against him for that purpose.[27]

Failure to Keep Accounts, etc.

The second ground of opposition to the bankrupt's discharge is the fraudulent failure to keep books of account, when in contemplation of bankruptcy. The amendment of February 5, 1903, has materially changed the language of this part of section 14, so that now in order to defeat a discharge on this ground, it is only necessary to prove that the bankrupt, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. The omission of the word "fraudulent" from the first draft of the act does not materially change it, for, even under this amendment, any such intent as that defined would be fraudulent. But the omission of the words "in contemplation of bankruptcy" does very materially change the original act, and defeats a discharge for improper concealment or destruction of books, even though not in contemplation of bankruptcy. This change was probably made in consequence of the fact that the courts had not entirely agreed as to the meaning of this phrase. For in-

[24] In re Skinner (D. C.) 97 Fed. 190; In re Gammon (D. C.) 109 Fed. 312.

[25] In re Eaton (D. C.) 110 Fed. 731.

[26] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157; In re Blalock (D. C.) 118 Fed. 679.

[27] In re Dow's Estate (D. C.) 105 Fed. 889; In re Gaylord, 112 Fed. 668, 50 C. C. A. 415.

stance, in the case of In re Shertzer [28] it was held that contemplation of bankruptcy was by no means the equivalent of contemplation of insolvency; thereby implying that even proof of insolvency at the time would not be sufficient. On the other hand, it had been held that a bankrupt who failed to keep such books when he must have known that he was hopelessly insolvent must be presumed to have done it fraudulently and in contemplation of bankruptcy.[29]

The amendment adopts this latter construction of the act, and renders the task of the opposing creditor, to that extent, easier. The mere failure to keep books under the original act, or the keeping of insufficient and inaccurate books, was not of itself sufficient to defeat a discharge on this ground—certainly in case of a business where the keeping of an elaborate set of books was not necessary. The failure must have been with fraudulent intent.[30]

The actual destruction of books would defeat an application under this clause.[31]

The delinquency which will defeat a discharge on this ground must be a personal delinquency of the bankrupt. For instance, in the case of a partnership, the failure of one partner to keep proper books would not defeat the application of an innocent partner for his discharge.[32]

Where a husband conducted the business of his wife, she leaving everything to him and being innocent herself, his failure to keep proper books would not defeat her application.[33]

Other Grounds.

The new grounds specified in the amendment of February 5, 1903, hardly require discussion.

[28] (D. C.) 99 Fed. 706.

[29] In re Kenyon (D. C.) 112 Fed. 658; In re Feldstein, 115 Fed. 259, 53 C. C. A. 479.

[30] In re Idzall (D. C.) 96 Fed. 314; In re Corn (D. C.) 106 Fed. 143; In re Lafleche (D. C.) 109 Fed. 307.

[31] In re Conley (D. C.) 120 Fed. 42.

[32] In re Schultz (D. C.) 109 Fed. 264.

[33] In re Hyman (D. C.) 97 Fed. 195.

THE DEBTS NOT AFFECTED BY A DISCHARGE.

74. The debts not affected by a discharge in bankruptcy are liabilities for obtaining property by false pretenses or false representations, or for willful or malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.

Section 17 of the act prescribes the effect of a discharge when granted. The second subdivision in the original act reads: "are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another."

This subdivision has been changed by the act of February 5, 1903, to read as follows: "are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation."

This amendment was evidently intended to meet the course of decisions on the original act. It seemed to contemplate that the only other liabilities which were unaffected by the discharge were those which had been reduced to judgment. Under its original form, the courts have held that, if it did not cover debts not reduced to judgment, they would give the creditor time to reduce his claim to judgment, so that the discharge could not affect them.[84]

There had been some conflict of decisions on the question of what constituted a willful or malicious injury to the person. In the case of In re Tinker,[85] it had been questioned whether

[84] In re Cole (D. C.) 106 Fed. 837; In re Wollock (D. C.) 120 Fed. 516. As to false representations, see FORSYTH v. VEHMEYER, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723.

[85] (D. C.) 99 Fed. 79. But the question of the effect of this same

this phrase would cover damages in an action of crim. con. as that would hardly be said to be a willful or malicious injury to the person of the husband. On the other hand, in the case of In re Freche,[86] it had been held that damages recovered for the seduction of a daughter did come within this language, and in the case of In re Maples [87] it was held that a judgment by an unmarried woman for her own seduction, under a Montana statute giving such a right of action, was a willful and malicious injury to her person or property. These questions are set at rest by the amendment.

However, if there is a liability for an alleged fraudulent transaction, and the creditor, waiving the fraud, closes it by taking promissory notes of the debtor, and then gets judgment on the notes, that is not a judgment in an action for fraud, in the sense of the original act.[88]

Another class of debts not affected by a discharge are the unscheduled debts, unless the creditor had notice or actual knowledge of the bankruptcy proceedings.

The last class mentioned is debts created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. The fraud contemplated in this subdivision and the previous one means actual, positive fraud, involving moral turpitude, not mere constructive fraud or fraud in law.[89]

It is well settled that the debts contemplated by this subdivision are those arising on actual, technical trusts, and were not intended to cover trusts arising from mere relations of

discharge was decided in Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, to the effect that such cause of action was not barred by a discharge.

[86] (D. C.) 109 Fed. 620.

[87] (D. C.) 105 Fed. 919.

[88] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596.

[89] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; Western Union Cold Storage Co. v. Hurd (C. C.) 116 Fed. 442.

confidence, even though that may be the colloquial sense of the term.[40]

For this reason, debts due by a commission merchant or broker to customers for property of theirs which he has sold are not debts contracted in a fiduciary capacity, in the sense of the statute.[41]

REVOCATION OF A DISCHARGE.

75. Under section 15 of the act, the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

This evidently contemplates a showing on the proceeding for a revocation about as strong as that necessary to secure a new trial at common law on the ground of after-discovered evidence. The ignorance of creditors alone is not enough, if the facts on which they base their motion to revoke were known to the trustee, as he represents them to this extent.[42]

A fraud long prior to the adjudication in bankruptcy is not such a one as is contemplated by this section.[43]

Even a creditor who has not proved his claim is sufficiently a party in interest to move for a revocation, and the court itself, if it thinks that there are sufficient reasons for it, may revoke the discharge within the year.[44]

[40] Bracken v. Milner (C. C.) 104 Fed. 522; In re Butts (D. C.) 120 Fed. 966.

[41] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931; In re Basch (D. C.) 97 Fed. 761; Knott v. Putnam (D. C.) 107 Fed. 907.

[42] In re Hansen (D. C.) 107 Fed. 252.

[43] In re Hoover (D. C.) 105 Fed. 354.

[44] In re Bimberg (D. C.) 121 Fed. 942.

But if the bankrupt has fraudulently concealed or failed to list his property, and this fact is found out by the creditors after the granting of the discharge, and could not have been found out before, then the discharge may be revoked.[45]

[45] In re Meyers (D. C.) 100 Fed. 775.

CHAPTER IX.

THE DISTRICT COURT (Continued)—MISCELLANEOUS JURISDICTION.

76. Claims against the United States—Proper Forum.
77. Same—The Subjects of Jurisdiction.
78. Same—The Procedure.
79. Same—The Appeal.
80. Same—The Proper Appellate Court.
81. Suits to Abate Unlawful Inclosures of Public Lands.
82. Suits under the Interstate Commerce Act.
83. Condemnation Proceedings.
84. Writ of Habeas Corpus.
85. Same—Federal Jurisdiction.
86. Same—When Jurisdiction Exercised.
87. Same—The Particular Federal Courts—Courts Having Jurisdiction to Issue.
88. Same—Procedure on Habeas Corpus.

CLAIMS AGAINST THE UNITED STATES—PROPER FORUM.

76. All suable claims against the United States may be prosecuted in the court of claims, which is located in Washington. The district and circuit courts have concurrent jurisdiction with this court over such claims in certain classes of cases fixed by law; the jurisdiction of the district court being limited to cases involving not over one thousand dollars, and that of the circuit court to those over that amount, and up to and not exceeding ten thousand dollars.

Until the act of March 3, 1887, known as the "Tucker Act," [1] the only court which had jurisdiction of claims against the United States was the court of claims. This act, however, gave to the district and circuit courts concurrent jurisdiction

[1] 24 Stat. 505, c. 359 [1 U. S. Comp. St. 1901, p. 752].

with the court of claims, the jurisdiction of the district court being limited to cases involving not over one thousand dollars, and the jurisdiction of the circuit court to cases over that amount up to ten thousand dollars. The theory of this act is to give the litigant an opportunity of asserting his claim against the government in a more convenient forum than the court of claims, which may be far distant from him.

SAME—THE SUBJECTS OF JURISDICTION.

77. The first section of the act gives jurisdiction on claims founded on the Constitution or laws of the United States, or upon contracts, express or implied, in cases not sounding in tort, except in war claims and claims adversely acted upon by other government agencies authorized to act. Claims for pensions, also, are excepted from the general class of jurisdiction.

The clause of this section on which jurisdiction is most commonly based is the clause giving jurisdiction for claims founded "upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable." This includes only money demands. It does not give any of the courts jurisdiction in equity to compel the issue and delivery of a patent for public lands, nor to cancel a judgment lien in favor of the United States illegally placed upon an individual's land by a government officer.[2]

Claims for a Tort.

Claims for a tort are expressly excluded, and this regardless of the mere form of pleading which the plaintiff may

[2] U. S. v. Jones, 131 U. S. 1, 9 Sup. Ct. 669, 33 L. Ed. 90; Holmes v. U. S. (D. C.) 78 Fed. 513.

adopt. For instance, a suit by a person who, while in a government building, is injured by the fall of a government elevator, cannot be sustained, even though allegations may be made that there was a promise of the government to carry the plaintiff safely.[3] In order to sustain the jurisdiction on the ground of an implied contract, there must be some element of contract in the case. For instance, suit may be brought for the value of property taken by the government without compensation, where no adverse title to the property is set up by the government, for there is an implied contract with the government to pay for property so taken.[4]

On the other hand, when the claimant's right to the property is denied, and the government takes it under the assertion of a right to use it, then the action is in tort, and cannot be sustained on the theory of an action for use and occupation; nor can it be made an action on contract by merely alleging an implied promise to pay under such circumstances.[5]

This distinction, also, is well illustrated by the decisions in reference to the use of a patent by the government. Where the use is with the consent of the patentee, a promise to pay is implied, and suit is maintainable; but, where the use is without the consent of the patentee, a suit by the patentee is in tort, and not sustainable, even though he may choose to frame his pleadings on the theory of an implied contract.[6] And a suit for an injury equivalent to a taking of the property without compensation, where the government does not deny the title, is within the statute.[7] A suit by a contractor for extra work, and damages caused by the interference of a government agent during the work—the contractor having

[3] BIGBY v. U. S., 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519.
[4] U. S. v. Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846.
[5] Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862.
[6] U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442; Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108.
[7] U. S. v. LYNAH, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539.

a contract with the government—is sustainable as an action of contract.[8]

In such suits the government can set up a counterclaim, and recover judgment on its counterclaim.[9]

These suits must be brought within six years after the right of action accrues, but the additional time allowed by the saving clause of section 1069* of the United States Revised Statutes to persons beyond seas and under disability is also to be taken into account.[10]

Concurrent Jurisdiction.

The jurisdiction of the district and circuit courts within the pecuniary limits above mentioned is coincident with the court of claims, except that under the amendment of June 27, 1898, they cannot take cognizance of cases brought to recover fees, salary, or compensation for official services of officers of the United States, or their assigns; the idea probably being that suits of this sort can best be asserted at the seat of government, where the court of claims is located.

Claims by an Alien.

It is an interesting question whether an alien can sue under this act in the district or circuit court. In favor of his right to sue, it may be said that he certainly has the right to sue in the court of claims, provided his own country permits a similar privilege to citizens of this country. This right is expressly given by section 1068 of the Revised Statutes. Then the second section gives the district or circuit courts concurrent jurisdiction with the court of claims, excepting only suits by officers. If the act stopped here, the right of an alien to sue would be clear, but the fifth section of the act requires the petition to be filed "in the district where the

[8] Bowe v. U. S. (C. C.) 42 Fed. 761.

[9] Steele v. U. S., 113 U. S. 128, 5 Sup. Ct. 396, 28 L. Ed. 952; U. S. v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832, 31 L. Ed. 662.

[*] U. S. Comp. St. 1901, p. 740.

[10] U. S. v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130.

plaintiff resides." A resident alien, therefore, could undoubtedly sue, but whether an alien who merely comes into the United States for a temporary purpose can sue, and, if so, where, is a more difficult question. For instance, there have been some cases of British captains towing in government light-ships, and then claiming salvage upon them. Such aliens resided in no district, and yet public policy would seem to require that they should be encouraged to render such salvage services. Such a case was that of The Viola,[11] but the question of jurisdiction was not raised in the case. In any event, it would seem clear that if such a suit is brought, and the United States by an authorized officer appears and defends on the merits, the court would have jurisdiction of the case; the question of the mere district in which to sue being a question of personal jurisdiction, and not jurisdiction over the subject-matter, and therefore one which can be waived.

SAME—THE PROCEDURE.

78. A suit under this act is instituted by filing a petition in the proper court duly verified, and setting out the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of his case.

A copy of this petition must be served upon the district attorney of the United States in the district where the suit is brought, and another copy must be mailed by registered letter to the Attorney General, and proof of this fact, by affidavit of the service and mailing of the letter, must be filed with the clerk of the court.

The district attorney must then appear within sixty days after the service and make defense, unless the court gives him further time. But no judgment by default can be taken in case he does not. It is still necessary to prove the claim to the satisfaction of the court. The trial is by the court

[11] (C. C.) 52 Fed. 172; 55 Fed. 829, 5 C. C. A. 283.

without a jury, and it is its duty to cause a written opinion to be filed in the case, setting forth the specific findings of the court on the facts, and its conclusions upon the questions of law involved, and to render judgment thereon. The court must proceed according to the nature of the cause of action asserted, whether at common law, in equity, or admiralty.

SAME—THE APPEAL.

79. On the decision of the case, either the plaintiff or the United States may have the right of appeal or writ of error, according to the nature of the case.

The earlier cases were taken up by appeal, and the provisions touching appeals or writs of error as then existing alluded to those in force at the time of the passage of the act in relation to the court of claims.[12]

In the case of Chase v. United States [13] the question was presented whether the course of review in such case should be by appeal, or whether it could also be by writ of error. It was decided that the method of review depended upon the nature of the case. If it was in its nature a common-law case, the review should be by writ of error. If it was an equity or admiralty case, the review should be by appeal. This test, while clear enough on principle, may frequently be difficult to apply in practice. The only pleadings are petition and answer, and there are so many instances where courts of common law, courts of equity, and courts of admiralty have concurrent jurisdiction, that it may often be difficult to decide in a given case whether the case is in its nature a common-law, an equity, or an admiralty suit. For instance, suppose the case of towing in a disabled light-ship

[12] Strong v. U. S. (C. C.) 40 Fed. 183; U. S. v. Davis, 131 U. S. 36, 9 Sup. Ct. 657, 33 L. Ed. 93.

[13] 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284. See, also, U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556.

at the request of the crew aboard; if the vessel were not a government vessel, the party rendering the service could sue on a simple contract of employment at common law, or could sue in personam or in rem in an admiralty court for salvage. So, too, if the government should charter some vessel and the owner should sue for the charter money, that would be a suit of which either a common-law or an admiralty court might have jurisdiction. In such cases either method of review would probably be safe.

SAME—THE PROPER APPELLATE COURT.

80. The proper appellate court in such cases, where no special question is involved, is the circuit court of appeals.

The court to which appeals from decisions of the district or circuit courts should now be taken, where no special question was involved, is the circuit court of appeals. Prior to the act of March 3, 1891,† establishing that court, the Supreme Court had held that an appeal went from the district court to the Supreme Court, regardless of the amount involved, basing it upon the rule applicable to the court of claims.[14] The case of Chase v. United States,[15] though not decided until 1894, was an appeal from a judgment rendered in November, 1890. But the fourth section of the act of March 3, 1891, establishing the circuit courts of appeals, expressly provides that judgments of the district courts are subject to review only in the Supreme Court of the United States, or in the circuit courts of appeals as therein provided. The fifth section gives the Supreme Court jurisdiction only in special cases, involving mainly jurisdictional or constitutional questions, and criminal appeals. The sixth section

† U. S. Comp. St. 1901, p. 547.

[14] U. S. v. Davis, 131 U. S. 36, 9 Sup. Ct. 657, 33 L. Ed. 93.

[15] 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284.

provides that the circuit court of appeals shall review the final decisions of the district court in all other cases than those provided for in the fifth section, unless otherwise provided by law. And the fourteenth section of the act provides that all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions contained in the fifth and sixth sections, are repealed. Under these different provisions it is clear that appeals should go to the circuit court of appeals, unless there was some special ground of jurisdiction in the Supreme Court like those mentioned in the fifth section.[16]

The recent case of Bigby v. United States [17] went to the Supreme Court because there was a certificate that the jurisdiction of the court was in issue.

When the case goes up for review, it goes up simply on the findings of the court as to the facts and law, which is very much like a special verdict.[18] These decisions probably mean nothing more than that the plaintiff cannot take his whole case up on the evidence. They can hardly be presumed to mean that the lower court, by its opinion and findings, could shut out the review of rulings on legal questions. For instance, if the lower court should exclude evidence which it ought to have admitted, surely the plaintiff could take a bill of exceptions to such exclusion if the case were a common-law case, or make a formal tender of what he expected to prove in the depositions, and get the ruling of the court thereon, if the case were in equity or admiralty, and have the appellate court review the action of the lower court for such error of law.

[16] U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556.

[17] BIGBY v. U. S., 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519.

[18] U. S. v. Kelly, 89 Fed. 946, 32 C. C. A. 441; Stone v. U. S., 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477.

SUITS TO ABATE UNLAWFUL INCLOSURES OF PUBLIC LANDS.

81. The district and circuit and territorial district courts are given certain statutory jurisdiction in suits to abate unlawful inclosures of public lands.

Under the act of February 25, 1885,[19] inclosures of public lands by parties not having any color of title thereto are forbidden, and it is made the duty of the district attorney to institute a civil suit in the proper district or circuit court in the name of the United States against the offender. The act also gives jurisdiction to the district or circuit or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, is situated, to entertain proceedings in equity by writ of injunction to restrain violations of the act. It provides that process may be served on any agent or employé who has charge or control of the inclosure, and that if the inclosure is found to be unlawful the court may enter an order for its destruction in a summary way. Under this act equity has jurisdiction to remove an illegal inclosure by mandatory injunction, or to prohibit the erection of any other by ordinary injunction.[20] The proceeding is a special statutory proceeding giving relief in a form unknown to the common-law courts. It is not available against any one who claims under a bona fide claim or color of title, nor can the legal validity of the defendant's title be settled in such a suit. As far as title is concerned, the only question which the court can consider is whether the defendant has a bona fide claim or color of title.[21]

The act forbids any inclosure of government lands, even though the inclosure is brought about by fences erected on

[19] 23 Stat. 321, c. 149 [2 U. S. Comp. St. 1901, p. 1524].

[20] U. S. v. Ranch Co. (C. C.) 25 Fed. 465; Id., 26 Fed. 218.

[21] U. S. v. Osborn (C. C.) 44 Fed. 29; Cameron v. U. S., 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

the claimant's own lands. For instance, where the claimant owned alternate sections and the other sections were owned by the government, it was held to be a violation of the act to build fences, even on the claimant's own lands, a few inches off from the boundary, the result of which was to inclose the government's sections also; and this though the claimant supplied gates giving easy access to the government's sections, and though the claimant's object was a public one.[22]

SUITS UNDER THE INTERSTATE COMMERCE ACT.

82. The ninth section of the interstate commerce act[23] provides that any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission as thereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable, under the provisions of that act, in any district or circuit court of the United States of competent jurisdiction; but he cannot pursue two of these remedies, and must elect between them.

This remedy given by the act itself is limited to an action for damages by the individual. As it is in the nature of a penalty, it must show not only the wrong of the carrier, but some actual injury or damage to the plaintiff.[24]

This remedy is cumulative only, and is not intended to prevent the party injured from resorting to other remedies to which he would be entitled under the general principles of law. For instance, any suit based upon the interstate commerce act would necessarily involve a federal question, and the plaintiff would have the right to pursue the regular reme-

[22] Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260.

[23] 24 Stat. 379, c. 104 [3 U. S. Comp. St. 1901, p. 3154].

[24] Parsons v. Railway Co., 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231.

dies in the federal courts provided for such cases, if the other requisites of jurisdiction as to amount, etc., existed.[25]

In cases of urgency a carrier could resort to the remedy of injunction to compel a common carrier to interchange traffic with it to which it would be entitled under the provisions of this act, and this would be a federal question.[26]

CONDEMNATION PROCEEDINGS.

83. Under the federal statutes several proceedings by condemnation are authorized, the principal jurisdiction in these being in the district court.

1. *The Act of February 22, 1867.*[27]

This act authorizes the Secretary of War to purchase such real estate as is necessary for national cemeteries, or, in case he cannot agree with the owner, to enter upon and appropriate any real estate which in his judgment is suitable and necessary for such purpose. In order to secure the rights of the owner, the act provides that the Secretary of War, or the owners, may apply to the circuit or district court within any state or district where such real estate is located for the appointment of appraisers; and it gives the court power, upon such application, to so frame its proceedings as to secure a just and equitable appraisement. It further provides that on payment of the appraised value to the owner, or into court in case he refuses to take it, the title shall be vested in the United States, and its jurisdiction over such estate shall be exclusive.

[25] Little Rock & M. R. Co. v. Railroad Co. (C. C.) 47 Fed. 771; Id., 159 U. S. 698, 16 Sup. Ct. 189, 40 L. Ed. 311.

[26] Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 746, 19 L. R. A. 395. See the subsequent developments of this case (Ex parte Lennon) in 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; 64 Fed. 320, 12 C. C. A. 134; and 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

[27] Rev. St. 4870–4872 [3 U. S. Comp. St. 1901, p. 3375].

2. *The Act of April 24, 1888.*[28]

This act provides for the condemnation of such property as is necessary to maintain, operate, or prosecute works for the improvement of rivers or harbors. It provides that the procedure shall be according to the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted, and also that they shall be in any court having jurisdiction of such proceedings.

3. *The Act of August 1, 1888.*[29]

This is much more general than either of the two preceding acts, and provides for condemnation proceedings, whether to procure real estate for the erection of a public building, or for any other public use. It expressly provides that the jurisdiction of these proceedings shall be in the circuit or district wherein such real estate is located, and that the practice, pleadings, forms, and modes of proceeding shall conform as near as may be to the practice, pleadings, forms, and mode of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held. This is much the most general act, and the one under which these proceedings are usually instituted.

4. *The Act of August 18, 1890.*[30]

This provides for the condemnation by the Secretary of War of any land, or right pertaining thereto, needed for fortifications or coast defense. It assimilates the proceeding to the state practice, and provides that it shall be in any court having jurisdiction of such proceedings.

It is well settled under the decisions that the United States have jurisdiction to condemn land for public purposes. In fact, this is an attribute of sovereignty, and essential to the proper exercise of its governmental powers. Without it the

[28] 25 Stat. 94, c. 194 [3 U. S. Comp. St. 1901, p. 3525].
[29] 25 Stat. 357, c. 728 [2 U. S. Comp. St. 1901, p. 2516].
[30] 26 Stat. 316, c. 797 [2 U. S. Comp. St. 1901, p. 2518].

country might be at the mercy of a foreign enemy, and the internal administration of the government at the mercy of the separate states.[31]

The general principles which regulate all condemnation proceedings apply in these matters. For instance, it is not necessary to have a jury in the sense of a common-law jury of twelve men. The procedure may provide for a simple jury of inquest to pass upon the single question of damages, and need not require unanimity.[32]

The property specially benefited may be charged with an equitable portion of the benefit, or the court may provide that the special benefits to the special tract may be set off against the damages.[33]

An act of this sort need not require payment to the owner in advance of entry, but may give a right of entry on the land by the payment of money into court.[34]

The question as to what constitutes a public use has received a very liberal construction from the courts. In the case of United States v. Gettysburg Electric Ry. Co.,[35] it was held that the preservation of the Gettysburg battlefield constituted such a public use, and that a statute authorizing the same was valid, and hence a procedure against a railway company, condemning part which had already been devoted by it to the public use, was upheld. So, in the case of Shoemaker v. United States,[36] the

[31] U. S. v. RAILWAY CO., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510.

[32] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270.

[33] Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270.

[34] Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527; Cherokee Nation v. Railway Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.

[35] U. S. v. RAILWAY CO., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576.

[36] 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

validity of an act authorizing the condemnation of land for a public park in Washington City was upheld. As the District of Columbia is under national control, this decision is tantamount to the doctrine that within lands over which the United States has exclusive jurisdiction their power of eminent domain is as extensive as that of the states; but whether the United States would have jurisdiction to condemn a park in territory not under the exclusive jurisdiction of the federal government, as, for instance, in a state, is not settled by this decision.

An act of Congress authorizing condemnation proceedings may vest the power of condemnation in the federal courts, or may delegate it to the state courts.[37]

A petition under these acts for the right to condemn should allege on its face the authority and the necessity for instituting the proceedings, and the importance of the property for the public use in contemplation.[38]

The above provision as to condemnation proceedings, assimilating them to state procedure to the same purpose, does not require absolute identity of procedure. They need only approximate the state procedure.[39]

WRIT OF HABEAS CORPUS.

84. The general principles of habeas corpus in the federal courts are the same as those prevailing under the common law.

This writ is not a writ of error, and cannot be used to correct mere errors or irregularities in procedure. It raises only the question of jurisdiction, or power of the party to hold the applicant in custody.

[37] U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015.

[38] In re Montgomery (D. C.) 48 Fed. 896; In re Manderson, 51 Fed. 501, 2 C. C. A. 490.

[39] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510.

Nature of the Writ.

This is the great writ which has played such an important part in the political and legal history of the English race. Its purpose is to inquire whether a subject is illegally restrained of his liberty. Though it affects criminal proceedings, it is in its nature a civil writ.[40] In order to authorize the issue of the writ, there must be some actual restraint of liberty. A leading case on this subject is Wales v. Whitney.[41] There a medical director in the navy, who resided in Washington, received a letter from the Secretary of the Navy notifying him that he was placed under arrest, and commanding him to remain within the limits of the city of Washington pending proceedings against him by court-martial. No actual process, however, was issued, and there was no actual seizure of his person. His right to the writ was denied, as there was nothing to show such a restraint as justified the issue of the writ, for it would have been impossible for the Secretary of the Navy or any one else, on the return to the writ, to say that he held custody of the applicant.

The fundamental underlying principle as to the issue of the writ is that it is not a writ of error, and cannot be used to correct mere errors or irregularities in procedure. It raises only the question of jurisdiction, or power of the party to hold the applicant in custody. The Supreme Court has had occasion at almost every term to reiterate this principle, as the desperate struggles of convicted criminals to postpone the inevitable as long as possible result in constant applications by habeas corpus to review the action of the court or other body by whom the sentence has been imposed. Some ilustrations of the method in which this general principle has been applied will better serve to show its limits. The courts will not permit it to be used as a means of collaterally ques-

[40] Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896.

[41] WALES v. WHITNEY, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

tioning the propriety of injunction orders.[42] It cannot be used for the purpose of reviewing a mere question of regularity on proceedings to punish for contempt. For instance, where a party had been punished for creating a disorder in the actual presence of the court, or for attempting to bribe a witness in a jury room or hall adjoining the courtroom, the writ was refused, as the court had jurisdiction to punish such contempts, and the question whether the contempt had actually been committed or not was a question of fact which could not be reviewed by such a writ.[43]

It cannot be used to review proceedings before a United States commissioner in the examination of a poor debtor on a judgment of a United States court, or in holding a party arrested under foreign extradition papers, if it appeared that the crime for which the party was extradited was one covered by the extradition treaty.[44]

It cannot be used as an appellate writ for the purpose of reviewing proceedings in court-martial, where the court-martial had jurisdiction of the crime.[45] But where the court was illegally constituted, as where a volunteer was being tried by a court composed entirely of regulars, such defect became jurisdictional, and habeas corpus would lie.[46]

When, however, it is said that it will only review questions of the jurisdiction of a court or committing authority, it is not meant that it will not lie at all if the committing author-

[42] In re DEBS, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

[43] Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150.

[44] Stevens v. Fuller, 136 U. S. 468, 10 Sup. Ct. 911, 34 L. Ed. 461; Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787; Bryant v. U. S., 167 U. S. 104, 17 Sup. Ct. 744, 42 L. Ed. 94; Terlinden v. Ames, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534.

[45] WALES v. WHITNEY, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

[46] McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049.

ity originally had jurisdiction. There are many cases where the committing authority had jurisdiction in the first instance over the general subject or crime, but had no jurisdiction to enter the special order complained of. In such case habeas corpus would lie to question the power to make such an order. For instance, in the case of Ex parte Bain,[47] the court permitted the amendment of an indictment which had been regularly found in the first instance, and of which the trial court had jurisdiction. The Supreme Court held on habeas corpus that the effect of permitting the amendment of the indictment made it no indictment at all, as an indictment was not amendable, and that therefore any sentence entered upon such amended indictment was necessarily void, and habeas corpus would lie.

In the case of Ex parte Nielsen [48] the proceedings were regular up to the sentence, but the accused was sentenced a second time for the same offense. The court permitted a habeas corpus in such case, as the error did not commence until after sentence.

Under state extradition proceedings it is usually competent to raise the question whether the party is a fugitive from justice on habeas corpus. The distinction is well illustrated in the cases of Cook v. Hart [49] and Hyatt v. People.[50] In the first case extradition papers had been issued, and the accused had been taken back under them to the state whence they were issued, and tried. The court held that in such case he could set up, in the state court where he was being tried, the defense that he was not a fugitive from justice, and would not be permitted to raise it by habeas corpus afterwards. In the second case, when he was arrested he resisted the attempt to take him back to the state of issue, and applied for a habeas corpus, showing that on the date when the crime

[47] EX PARTE BAIN, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849.
[48] 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.
[49] 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.
[50] 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657.

was alleged to have been committed he was not within the state where it was alleged to have been committed. The court held that in such case the writ would lie. In fact, it is a general doctrine that the courts lean against considering, on habeas corpus, questions that could be raised before the committing or trying court, though, if the judgment of such court is absolutely void, the writ may issue.[51]

The writ will not lie to attack the validity of proceedings before a de facto judge.[52]

SAME—FEDERAL JURISDICTION.

85. The federal courts have power to issue the writ of habeas corpus in all cases arising under the Constitution or laws of the United States, or in connection with federal process.

This jurisdiction is set out in section 753 of the Revised Statutes.[53] The federal courts have not general common-law jurisdiction to inquire into any restraint of liberty. They can only take cognizance on habeas corpus of questions arising under the Constitution or laws of the United States, or in connection with federal process. They cannot consider questions of restraint of liberty arising simply from acts violating state laws or state constitutions.[54]

In the case of In re Burruss [55] the court refused to consider the question of disputed right to the custody of a child, not depending in any way upon any federal law.

In the case of In re Duncan[56] it refused to consider the question whether a law was passed according to the require-

[51] Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177.

[52] Ex parte Ward, 173 U. S. 452, 19 Sup. Ct. 459, 43 L. Ed. 765.

[53] 1 U. S. Comp. St. 1901, p. 592.

[54] Storti v. Mass, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120.

[55] 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500.

[56] IN RE DUNCAN, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219.

ments of the state constitution, holding that such was not a federal question, and raised no question relating to due process of law.

In Andrews v. Swartz [57] the failure of a state to give an appeal in criminal cases was held not to raise a federal question, nor a violation of the provisions relating to due process of law, and therefore not to be questioned by habeas corpus.

In Howard v. Fleming [58] the same principle was repeated, where an attempt was made to question whether an indictment charged a crime in a state court, or whether it was due process of law to fail to instruct the jury on the question of the presumption of innocence.

In the case of Ex parte Kinney [59] it was held that the violation of a state statute forbidding intermarriage between white and colored persons raised no federal question.

On the other hand, the court has given a liberal construction to the clause of section 753 of the Revised Statutes, allowing the writ where the applicant is in custody for an act done or committed in pursuance of a law of the United States. In the great case of In re Neagle [60] it became necessary to protect Mr. Justice Field from violence while holding his court in California, and while going to and proceeding therefrom, and the department of justice appointed a special deputy to accompany him and protect him. There was no special federal statute authorizing the protection of judges in such cases. Neagle, while accompanying the judge, shot and killed a man by the name of Terry, who was in the act of making a brutal assault upon the judge, and who but a short time before had taken part in creating a disorder in the courtroom. Neagle was arrested in the state court and charged with murder. He was released on habeas corpus, the court holding that his custody was for an act done or committed in pursuance

[57] 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.
[58] 191 U. S. 126, 24 Sup. Ct. 50, 48 L. Ed. 121.
[59] 3 Hughes, 9, Fed. Cas. No. 7,825.
[60] IN RE NEAGLE, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

of a law of the United States, and that it could and should protect him on habeas corpus.

In the case of Boske v. Comingore [61] the court discharged on habeas corpus an internal revenue officer who had been arrested for refusing to produce records in a state court, holding that his right to refuse to produce the records depended upon the federal law.

Concurrent State Jurisdiction.

But while the federal courts have jurisdiction to issue the writ in cases involving a federal question, the state courts have to a certain extent a concurrent jurisdiction with them. They are just as much as the federal courts the guardians of rights arising under the federal Constitution, and are just as much required to enforce such rights as the supreme law of the land. Hence a party illegally restrained for an act involving his rights under the federal Constitution can appeal on habeas corpus to such state courts as have jurisdiction. But this is subject to the qualification that the state courts cannot issue a habeas corpus which would interfere with the custody of an officer of the federal court, or any officer of the United States, as such power would inevitably bring on conflict and hamper the powers of the federal government.[62]

In such case, if the state court decides against the federal right, an appeal lies to the Supreme Court under section 709 of the Revised Statutes, which is the present form of the famous twenty-fifth section of the judiciary act of 1789.

[61] 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846.

[62] Robb v. Connelly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640.

SAME—WHEN JURISDICTION EXERCISED.

86. While the federal courts have jurisdiction to issue the writ when a federal question is involved, they are disinclined to exercise that jurisdiction, and will not issue it except under special circumstances of urgency.

This principle applies with special force when they are asked to issue it to affect proceedings in state courts. They have more than once said that it is a delicate jurisdiction, and that all the presumptions are against interfering with the ordinary administration of justice in state courts. As a writ of error lies from the state court of last resort in case of a decision adverse to the federal right, they will usually leave the applicant to his writ of error, as it gives him equal protection.

In the case of In re Wood [63] they refused to issue the writ when the federal question raised was that negroes were excluded from a jury contrary to the civil rights act. Such questions should be raised in the state court, and a writ of error taken in the event of an adverse decision.

In State of New York v. Eno [64] the writ was refused to a state prosecution for violation of an offense which could also have been punished in the federal court under the national banking act, the court holding that the proper process was writ of error.

In Baker v. Grice [65] the allegation of the application for the writ was that the Texas anti-trust law violated the federal Constitution. There was nothing to show that the applicant would be in any way prejudiced by leaving him to his writ of error, and he was accordingly left to that remedy.

In Minnesota v. Brundage [66] a writ of error was asked by a party arrested for a violation of a state act regulating the

[63] IN RE WOOD, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505.
[64] 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80.
[65] 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748.
[66] 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 640.

sale of dairy products, and the applicant was left to his writ of error for the same reason.

On the other hand, as instances of the special circumstances under which the writ issues, the case of In re Medley [67] might be mentioned. There a state law had been passed changing materially the method of punishment, which made it amenable to the objection of being an ex post facto law. The change in the method of punishment, however, was left largely to the keeper of the prison, and could not, in the nature of things, be inflicted until after sentence. In such case the court held that the writ would lie, as it was too late then to assign errors to a judgment in the state court.

The case of In re Loney [68] involved an application for the writ by a party who had been arrested in a state court for perjury in a congressional contested election case, the arrest being made immediately after he left the stand. The court held that such special circumstance authorized the issue of the writ.

The cases of In re Neagle [69] and Boske v. Comingore,[70] where the writ was allowed, have been mentioned in another connection.

SAME—THE PARTICULAR FEDERAL COURTS HAVING JURISDICTION TO ISSUE.

87. Sections 751 and 752 of the Revised Statutes [71] give this power to the Supreme Court and the circuit courts and district courts and their several justices or judges within their respective jurisdictions.

The district and circuit courts have practically concurrent jurisdiction in issuing the writ, but when it is asked from a

[67] 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835.
[68] 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949.
[69] IN RE NEAGLE, 135 U. S. 1, 10 Sup. Ct. 658, 35 L. Ed. 55.
[70] 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846.
[71] 1 U. S. Comp. St. 1901, p. 592.

single judge, he naturally is the more cautious not to interfere with proceedings in a state court. He is also more disinclined than courts usually are to pronounce a doubtful act of Congress unconstitutional.[73]

The Supreme Court also has original jurisdiction to issue the writ; in fact, as the jurisdiction of the Supreme Court extends over the whole United States, a Supreme Court justice may issue it anywhere, though on the return he would be apt to refer it for final decision to the full court.[74]

For a long time there was no appeal to the Supreme Court in criminal matters. In such cases it was cautious not to permit the writ to be used as a writ of error to the inferior federal courts. On application to it for the writ in such cases, it would only consider the jurisdiction of the court. In the case of Ex parte Carll[74] it held that it would only consider the power of the lower authority to commit for the crime charged. In In re Lancaster[75] it refused to issue the writ to the circuit court when the writ attempted to raise a question on an indictment which could have been raised in the circuit court by motion to quash. In In re Swan,[76] which was a contempt proceeding for interfering with the custody of a federal receiver, it refused to discharge the applicant on habeas corpus.

The Supreme Court, also, is reluctant to issue the writ when the circuit court may do so with equal convenience.[77]

[73] U. S. v. Ames (C. C.) 95 Fed. 453.
[74] Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715.
[74] 106 U. S. 521, 1 Sup. Ct. 535, 27 L. Ed. 288.
[75] 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713.
[76] 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207.
[77] Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513.

SAME—PROCEDURE ON HABEAS CORPUS.

88. Section 754 of the Revised Statutes [78] requires that the application shall be made by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known; and that the facts set forth in the complaint shall be verified by the oath of the person making the application.

Requisites.

This provision that it must be signed by the party for whose relief it is intended, and that he must make oath to it, seems to be directory only, and has not been rigidly enforced. In the case of In re Neagle [79] it was neither signed nor sworn to by the applicant, but by some one in his behalf; and so, too, in the case of In re Baez.[80]

The applicant must set out the facts clearly, and show wherein a federal question is involved. Mere general allegations of such are not sufficient, and there is an express requirement that the claim under which the applicant is detained must be set out, if known; which means that copies of the proceedings attacked must be set out, or their essential parts stated in the application.[81]

Rule to Show Cause.

The court, instead of issuing the writ in the first instance, may, if it thinks proper, first issue a rule to show cause why the writ should not issue.[82]

[78] 1 U. S. Comp. St. 1901, p. 593.

[79] IN RE NEAGLE, 135 U. S. 1, 10 Sup. Ct. 658, 35 L. Ed. 55.

[80] 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813.

[81] Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406;

[82] In re Lewis (C. C.) 114 Fed. 963.

Will Not Issue if Petition Shows Applicant Not Entitled to.

Under section 755 of the Revised Statutes [83] the court may issue the writ, unless it appears from the petition itself that the party is not entitled thereto. Under this clause of the statute it has been held that the writ will not issue when it appears upon the face of the petition that the prisoner is not entitled to it, or that it can serve no beneficial purpose to the applicant.

In Ex parte Terry [84] the application showed upon its face that the party had been committed for contempt, and that the court had authority to make the committal. So it was refused.

In In re Boardman [85] no federal question appeared upon the petition, and, as it was evident that the prisoner would be remanded if the writ issued, the court refused to issue it in the first instance.

In In re Baez [86] the applicant had been sentenced for illegally voting in Puerto Rico, but it appeared that his sentence had been for only thirty days, that most of it had expired when the writ was asked, and that the balance would expire before the court, in the nature of things, could consider the writ. Hence it was refused as involving a mere moot question.

The return is taken to be true until it is disproved,[87] and, where the writ is being used to attack collateral proceedings in another court, the applicant cannot contradict the record whose validity he is questioning.[88]

Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; Andersen v. Treat, 172 U. S. 24, 19 Sup. Ct. 67, 43 L. Ed. 351; Craemer v. State, 168 U. S. 124, 18 Sup. Ct. 1, 42 L. Ed. 407.

[83] 1 U. S. Comp. St. 1901, p. 593.

[84] 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405.

[85] 169 U. S. 39, 18 Sup. Ct. 291, 42 L. Ed. 653.

[86] 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813.

[87] Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

[88] In re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405.

On the other hand, he can prove facts which do not contradict the record, as in the case of Ex parte Cuddy,[89] where the procedure was for contempt on an attempt to bribe a juror. The record did not show where the attempt to bribe was made, and the court held that, for the purpose of considering the question, the party could prove this, as it did not contradict the record.[90]

Testimony, however, can be taken when it does not contravene these well-settled rules.[91]

Even where the prisoner is entitled to a writ, the court will not always discharge him unconditionally, but will frequently hold him until the proper authorities can be notified, so as to permit his rearrest in case the error complained of can be corrected.[92]

[89] 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154.

[90] Ex parte Mayfield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635.

[91] IN RE NEAGLE, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120.

[92] In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149.

CHAPTER X.

THE CIRCUIT COURT—ORIGINAL JURISDICTION.

89. Organization of the Circuit Courts.
90. Sessions of the Circuit Courts.
91. The Jurisdiction of the Circuit Courts—Criminal Jurisdiction.
92. The Civil Jurisdiction of the Circuit Courts.
93. Same—Suits of a Civil Nature at Common Law or in Equity—Meaning of "Suit."
94. Same—Same—Suits at Law.
95. Same—Same—Suits in Equity.
96. Same—Jurisdictional Amount.
97. Same—Federal Questions.
98. Same—Controversies between Citizens of Different States—Natural Persons.

ORGANIZATION OF THE CIRCUIT COURTS.

89. The entire United States are divided into nine circuits, to each of which one of the justices of the Supreme Court is assigned. Each of these circuits includes several states, and each state one or more judicial districts. Each judicial district has a circuit court of its own, the only link between the circuit courts of the different districts within the same circuit being that the same Supreme Court justice and the same circuit judges can hold them; two or more of the latter being appointed for each circuit, who may hold the circuit courts within that circuit. In addition to this, a district judge for any judicial district may hold the circuit court for his district. Any circuit court may be held by any one of the above-named judges sitting alone, or by any two of them sitting together.

Originally the only judges who could sit in the circuit courts were the district judge, who could hold the circuit court in his own district in so far as its jurisdiction was original, and the justice assigned to that circuit, who could hold the circuit court

of any district, and administer both its original jurisdiction and the appellate jurisdiction which it had until the act of March 3, 1891. Soon after the Civil War the increased duties of the Supreme Court justices caused the establishment of a circuit judge, and one was appointed for each circuit. He could hold the circuit courts anywhere in the circuit. By the act of March 3, 1891, establishing the circuit courts of appeals, an additional circuit judge was established for each circuit, and since then, by special acts, additional circuit judges have been provided in many of the circuits. Circuit courts may now be held by the circuit justice, any circuit judge of the circuit, or the district judge of the district sitting alone, or by any two of the said judges sitting together. This seems to be the necessary construction of section 609 of the Revised Statutes,[1] which, however, was passed before the establishment of the additional circuit judges, and in terms speaks only of one circuit judge.

Under section 650,[2] when the circuit justice and circuit judge, or circuit justice and district judge, or a circuit judge and district judge are holding court in a civil case, and there is a difference of opinion among them, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time. Since the establishment of two or more circuit judges for each circuit, there has been no change of the law providing for a case where two circuit judges are sitting together, so that it is difficult to say exactly what would happen in such case. As any circuit judge who sits in the lower court disqualifies himself from hearing the case on appeal, they are now disinclined to sit in the lower court, and still more disinclined to sit with each other, on account of the difficulty above suggested.

[1] U. S. Comp. St. 1901, p. 494. [2] U. S. Comp. St. 1901, p. 527.

THE SESSIONS OF THE CIRCUIT COURTS.

90. The word "sessions" is used in the federal statutes apparently as synonymous with "terms."

The sessions are provided by section 658 of the Revised Statutes,[3] which, with numerous amendments, names the time for all the circuit courts throughout the Union. In addition to these regular provisions, the judges may call special sessions for the trial of criminal cases, and in fact in many of the circuits the terms are kept open by adjournment so as to be practically continuous.

THE JURISDICTION OF THE CIRCUIT COURTS—CRIMINAL JURISDICTION.

91. The circuit court has concurrent criminal jurisdiction with the district court, and, in addition, exclusive jurisdiction of capital cases.[4]

THE CIVIL JURISDICTION OF THE CIRCUIT COURTS.

92. The original civil jurisdiction of the circuit courts extends to all cases wherein the following requisites concur:

First. It must be a suit of a civil nature at common law or in equity.

Second. The matter in dispute must exceed, exclusive of interest and costs, the sum or value of two thousand dollars, except where the United States are plaintiffs or petitioners.

Third. It must either

(1) Arise under the Constitution or laws of the United States, or treaties made under their authority; or

[3] U. S. Comp. St. 1901, p. 530.

[4] U. S. Comp. St. 1901, p. 455; Act Aug. 13, 1888, c. 866, 25 Stat. 433 [1 U. S. Comp. St. 1901, p. 508].

(2) It must be a case in which the United States are plaintiffs or petitioners; or

(3) It must be a case in which there is a controversy between citizens of different states; or

(4) It must be a controversy between citizens of the same state claiming lands under grants of different states; or

(5) It must be a case in which there is a controversy between citizens of a state and foreign states, citizens or subjects.

The circuit court is the court which has jurisdiction of the usual controversies arising between man and man, in so far as the federal courts have jurisdiction of such controversies; and in this respect it differs from the district court, on which most of the special statutory subjects of jurisdiction are conferred. This original jurisdiction of the circuit courts in the ordinary class of controversies is set out in the act of August 13, 1888,[5] which is an evolution of the acts on the subject from the judiciary act of 1789 to the present time. The first section of this act is as follows:

"Be it enacted," etc., "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs,

[5] 25 Stat. 433, c. 866 [1 U. S. Comp. St. 1901, p. 508].

the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It will now be necessary to analyze this section at length, as every line of it has been the subject of much discussion and many decisions. It will be observed, also, that the jurisdiction conferred by it is far short of the jurisdiction which Congress could constitutionally confer upon the federal courts, and the subsequent discussion will show that it is limited both as to the character of the suits and as to the amount. In order for the federal courts to have jurisdiction under this statute, the following requisites must concur: First, it must be a suit of a civil nature at common law or in equity; second, the matter in dispute must exceed, exclusive of interest and costs, the sum or value of $2,000 (except where the United States are plaintiffs or petitioners); third, it must either (1) arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or (2) it must be a case in which the United States are plaintiffs or petitioners,

or (3) it must be a case in which there is a controversy between citizens of different states, or (4) it must be a case in which there is a controversy between citizens of the same state claiming lands under grants of different states, or (5) it must be a case in which there is a controversy between citizens of a state and foreign states, citizens or subjects.

It will now be necessary to analyze these different requisites seriatim.

SAME—SUITS OF A CIVIL NATURE AT COMMON LAW OR IN EQUITY—MEANING OF "SUIT."

93. It is not every procedure which is a suit. The word is used in the sense of a proceeding in a court of common law or equity which culminates in a judgment that conclusively determines a right or obligation of the parties, so that the same matter cannot be further litigated except by writ of error or appeal.[6]

Matters of mere administration or ex parte proceedings are not suits, in the sense of this statute. For instance, it is well settled under this section that the federal courts have no probate jurisdiction for admitting or refusing the probate of wills, or for administering an estate by virtue thereof.[7]

By this it is meant that the federal courts have no probate jurisdiction as such. If, however, they have jurisdiction by virtue of the citizenship of the parties, and in some proceeding which is undoubtedly a common-law or equity proceeding, the fact that questions under a will are involved does not of itself defeat that jurisdiction.

A proceeding before a tribunal charged with the special power of revising a tax assessment has also been held not to be

[6] In re Stutsman Co. (C. C.) 88 Fed. 337.

[7] Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006; UPSHUR CO. v. RICH, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196; Wahl v. Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62.

a suit, within the sense of the federal statute. A leading case on this subject is Upshur Co. v. Rich,[8] which considered an appeal to a body called a county court in West Virginia. The court, however, reviewing the state statutes, held that this was not a court, in the proper sense of the term; that its duties were merely administrative, and not judicial; and that therefore the federal courts had no jurisdiction over such a proceeding. On the other hand, in In re Stutsman Co.[9] District Judge Amidon held that as the state statute in that case made the decision of the court conclusive and binding, and settled the obligation of the tax bill without any remedy except by appeal, it was a suit, in the sense of the statute.

Under the same principles, a proceeding for condemnation of lands may or may not be a suit, according to its nature. In so far as the proceeding is merely before a board of inquest, it is not a suit; but if the procedure is in a court, and unites the other requisites of jurisdiction, it may be one of which the federal court could take jurisdiction.[10]

A mandamus proceeding, on the other hand, is not a suit, in this sense, because mandamus in the federal courts is not an original writ, but rather in the nature of a writ of execution.[11]

On the other hand, a statutory civil action under a state law against a corporation for the forfeiture of its charter, which is the practical equivalent of a quo warranto proceeding, is such a suit.[12]

So, too, a writ of prohibition would come within this term.[13]

[8] UPSHUR CO. v. RICH, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196. See, also, PACIFIC STEAM WHALING CO. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253.

[9] (C. C.) 88 Fed. 337.

[10] Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; In re Delafield (C. C.) 109 Fed. 577.

[11] Davenport v. Dodge Co., 105 U. S. 237, 26 L. Ed. 1018; Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743.

[12] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482.

[13] Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481.

A habeas corpus proceeding would also be included within the term.[14]

SAME—SAME—SUITS AT LAW.

94. By a suit at law is not meant simply a suit authorized by the proceedings of the common law as distinguished from statutory proceedings, but it means a suit administering a legal right or title as distinguished from proceedings in equity or in admiralty.[15]

SAME—SAME—SUITS IN EQUITY.

95. A suit in equity means a suit within the jurisdiction of an equitable court, as that jurisdiction existed at the time when the Constitution went into effect. This was practically the jurisdiction of the old high court of chancery in England, and while the principle is well established in the federal courts that equity has no jurisdiction if there is an adequate remedy at law, it is equally well established that state legislation can, in a general sense, neither enlarge nor restrict the jurisdiction of the federal courts in equity; and hence the fact that there may be now an adequate remedy at law by virtue of a state statute does not defeat the jurisdiction of the federal equity court if the case is of a character in which it would have had jurisdiction in 1789.[16]

This principle that a state cannot enlarge the jurisdiction of the federal equity courts is a very important one. It can hardly

[14] Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579, 618.

[15] Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006.

[16] McCONIHAY v. WRIGHT, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; England v. Russell (C. C.) 71 Fed. 818; Green v. Turner (C. C.) 98 Fed. 756; National Surety Co. v. Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394.

be considered to go so far as to say that no additional state remedy in equity can be adopted by the federal courts, but it is clear that such additional remedies cannot be adopted if they would violate other provisions of the federal Constitution—notably, the provision that the right of jury trial shall be preserved. An analysis of the cases to be quoted shows that this is the point on which practically all of them turn. It is believed that a new remedy in equity given by the state court as to cases in which the party would not have been entitled to a jury trial at common law could be adopted by the federal courts.[17]

As an illustration of the principle that a state statute cannot substitute an equitable procedure for one which at common law would have been before a jury, Whitehead v. Shattuck[18] was a case in which the state statute gave a party who was out of possession a statutory right to proceed in equity to settle the title to real estate. The Supreme Court held that the federal court would have no jurisdiction over it. So, too, where a state statute gave a simple-contract creditor the right to file a bill in equity to set aside a conveyance alleged to be fraudulent, though it gave him a lien from the date of filing his bill, it was held that the federal courts had no jurisdiction, and that it was necessary to proceed to judgment on the claim at common law before such a creditor could file a bill, or at least to have some lien or charge which was enforceable under the general principles of equity jurisprudence.[19]

[17] National Surety Co. v. Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394.

[18] 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

[19] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

SAME—JURISDICTIONAL AMOUNT.

96. "The matter in dispute must exceed, exclusive of interest and costs, the sum or value of $2,000." The "matter in dispute," in the sense in which it is used as defining the pecuniary jurisdiction of the federal courts, means the claim presented on the record to the consideration of the court, though, as a matter of fact, the claim is not sustained by the proof, or though it is only in part well founded. It is the pecuniary consequences to the party which are dependent on the litigation.[20]

This means the amount or value directly at issue between the parties in the special suit. The collateral effect of that suit cannot be considered. For instance, where suit is brought upon coupons detached from bonds whose amounts were less than $2,000, and the issue raised involved not merely the validity of the coupons, but the validity of the bonds themselves, this fact did not give jurisdiction.[21]

The former statutes as to the jurisdiction of the federal circuit courts prescribed a lesser amount than the present limit of $2,000, and did not exclude interest from the computation. Hence decisions passing upon the amount then required are in point as to the general principle, though this difference between them must be borne in mind.

Prior to the establishment of the circuit courts of appeals, the limit to the jurisdiction of the United States Supreme Court was for a long time $2,000, and then $5,000. The statutes defining this limit used the same language as the above, except

[20] Kanouse v. Martin, 15 How. 198, 14 L. Ed. 660; Schunk v. Stoddard Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; WHELESS v. ST. LOUIS, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583.

[21] Town of Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; Bruce v. Railroad Co., 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990.

that interest was not excluded from the calculation. Hence decisions on the statutes limiting the jurisdiction of the Supreme Court are also in point, and it will be found that many of those referred to under this title relate to the jurisdiction of the Supreme Court under the former law.

The claim asserted by the plaintiff, in order to give jurisdiction, must be actually asserted in good faith, and not colorable merely. If, for instance, coupons or other evidences of indebtedness are transferred to a prospective plaintiff without consideration, and merely for the purpose of collection, the court will not acquire jurisdiction. Not only this, but under another section of the statute it is the duty of the court, of its own motion, even without a plea, to dismiss the case for want of jurisdiction on discovering that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties to the suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable by the federal courts.[22]

In considering whether the case involves a sufficient amount to give the court jurisdiction, reference will be made, not to the ad damnum clause alone, but to the whole declaration. For instance, where replevin was brought for liquors alleged to be worth $1,000, and the item of special damage to complainant's business was added, but it was apparent from the face of the declaration itself that the item was not recoverable, the court refused to sustain jurisdiction, though the ad damnum clause was large enough, considered alone, to give it.[23]

So, too, where the ad damnum clause was high enough, but one item of damage was claimed, which, on the face of the declaration, appeared to be illegal or not recoverable or prova-

[22] Waite v. Santa Cruz, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552.

[23] Vance v. Vandercook Co., 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111.

ble in evidence, the court held that the jurisdiction did not attach.[24]

On the other hand, in suits where there is no fixed measure of damages prescribed by law, as in suits for malicious torts or trespass, the court is practically compelled to go by the ad damnum clause, for the question of the amount of damages in such case is for the jury; and the court cannot say, as matter of law, that the ad damnum clause is laid too high, even though it might think that a recovery would not exceed the statutory requirement.[25]

As the measure is the plaintiff's claim, and not the amount actually due him, the final result is no test, and therefore the fact that the recovery is for less than the jurisdictional amount is immaterial. If this were not so, every verdict for a defendant in the federal court would conclusively establish the lack of jurisdiction of the court.[26]

Where the defendant sets up a counterclaim and asks for a cross-recovery, so that the question at issue is not simply the amount claimed by the plaintiff, but also the amount claimed by the defendant, the aggregate of the two amounts is the matter in dispute.[27]

So, too, where a counterclaim is set up as a defense merely in reduction of the plaintiff's claim, it does not defeat the jurisdiction, if the plaintiff's claim before any pleading was put in was sufficient in amount.[28]

Where the plaintiff sues for an amount, part whereof is barred by the statute of limitations, and this is apparent upon the petition, the court still has jurisdiction, for the statute of

[24] North American Transportation & Trading Co. v. Morrison, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061.

[25] Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84.

[26] Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632.

[27] Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476.

[28] Pickham v. Manufacturing Co., 77 Fed. 663, 23 C. C. A. 391; 168 U. S. 708, 18 Sup. Ct. 945, 42 L. Ed. 1211.

limitations is a personal plea, and the court cannot know judicially that the defendant will interpose it.[29]

The present act excludes interest from the computation in considering the jurisdiction of the circuit court. This, however, means interest only as such. Where suit is brought for a cause of action into which a calculation of interest enters merely as an item of damage, this does not defeat the jurisdiction of the court. For instance, in a suit for damages for a breach of warranty, where under the state statute the measure of damages was the cost of the property, with interest, the court had jurisdiction, though the cost, independent of interest, would not have given it.[30]

So, too, suits on matured coupons can take the coupons into account as well as the bonds, for detached and matured coupons are separate demands bearing interest themselves, and are not mere incidents of the present debt.[31]

In order for the federal circuit court to have jurisdiction under this clause, the subject-matter in dispute must be capable of pecuniary estimation; hence, although a proceeding by habeas corpus is a suit at law or equity, as above explained, the circuit court would not have jurisdiction of it by virtue of this statute, for the reason that no monetary amount is involved in it. The custody of a child, for instance, "rises superior to money considerations." [32]

Of course, these remarks as to habeas corpus merely mean that a federal circuit court has no jurisdiction of such a procedure by virtue of this special statute. It is given jurisdiction of habeas corpus proceedings by virtue of other statutes which have been already discussed.

[29] Board of Com'rs of Kearney Co. v. Vandriss, 115 Fed. 866, 53 C. C. A. 192; 187 U. S. 642, 23 Sup. Ct. 843, 47 L. Ed. 346; Schunk v. Stoddard Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255.

[30] Brown v. Webster, 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440.

[31] EDWARDS v. BATES CO., 163 U. S. 269, 16 Sup. Ct. 967, 41 L. Ed. 155.

[32] Barry v. Mercein, 5 How. 103, 12 L. Ed. 70; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

In considering the matter in dispute, the damages suffered are not always the test. For instance, in a suit to have a bridge removed, as a nuisance, the matter in dispute is not merely the damage caused to the plaintiff, but the value of the structure to be removed.[83]

So, in a procedure by injunction, the test of jurisdiction is the value of the right to be protected or the injury to be prevented.[84]

In a proceeding by a creditor to set aside an alleged fraudulent transfer of property, the jurisdiction is determined by the amount for which the creditor sues, not by the value of the property, for the defendant, by paying that amount, would be discharged from all obligation.[85]

So, in a suit to restrain an alleged illegal issue of bonds on the ground that the plaintiff's taxes will be materially increased, the jurisdiction is determined by the amount of the taxes the plaintiff would have to pay, not by the value of the total bond issue.[86]

Plurality of Plaintiffs or Defendants.

Where there is more than one plaintiff, the general rule is that if the interests of the plaintiffs are joint, and not several, the entire amount will be taken into consideration in determining the jurisdiction; but if their interests are several, and they have merely joined for convenience in bringing the suit, then the amounts due to the different plaintiffs cannot be joined for the purpose of conferring jurisdiction.

This is the general rule, though sometimes it may be difficult

[83] Mississippi & M. Ry. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Rainey v. Herbert, 55 Fed. 443, 5 C. C. A. 183.

[84] Nashville, C. & St. L. Ry. Co. v. McConnell (C. C.) 82 Fed. 65; Humes v. Ft. Smith (C. C.) 93 Fed. 857.

[85] Werner v. Murphy (C. C.) 60 Fed. 769; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79.

[86] Colvin v. Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; Linehan Ry. Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585.

to draw the exact line.[37] For instance, in the case of New Orleans Pac. Ry. Co. v. Parker,[38] a bondholder brought suit on behalf of all the bondholders under a mortgage, and actually represented more than two hundred bonds, and the mortgage permitted suit by any bondholder. The court held in such case that all the bonds could be considered for the purpose of conferring jurisdiction, as all the bonds claimed under the common source of title; that is, the mortgage.

On the other hand, in Wheless v. St. Louis [39] several parties owning separate lots brought a suit attacking an assessment against them for improving a street. The court held in such case that their interests were several, only, and could not be joined for the purpose of jurisdiction.

This same principle applies as to joining the defendants. Where the claims against the separate defendants are several, they cannot be joined for the purpose of conferring jurisdiction. For instance, suits against different county officers, combining them as defendants, to enjoin the collection of a tax separately assessed in their different counties, were several, and the claims against these different defendants could not be joined for the purpose of conferring jurisdiction.[40]

This principle, however, does not prevent parties from filing petitions for amounts under the jurisdictional amount where a suit involving the proper amount has already been brought, and the court has therefore acquired jurisdiction. If, in administering a fund, the court has acquired jurisdiction at the suit of one who had a sufficient amount to give it, petitions filed by others to share in the result of the suit are merely incidental, and can be considered by the court, even though they could not

[37] Rainey v. Herbert, 55 Fed. 443, 5 C. C. A. 183.

[38] 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66.

[39] WHELESS v. ST. LOUIS, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583.

[40] Walter v. Railway Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; FISHBACK v. TELEGRAPH CO., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; Citizens' Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451.

originally have combined for the purpose of giving jurisdiction.[41]

The fact that the requisite amount is involved must appear from the allegations of fact in the declaration. A mere general allegation that the sum of $2,000 is involved amounts to nothing more than a conclusion of law, and is not sufficient, unless the other parts of the declaration bear it out.[42]

Under this clause the court has held that the limitation of $2,000 does not apply to suits by the United States. The case which decides this contains a paraphrase of the statute as its meaning is gathered by the Supreme Court, which makes it much plainer than the act itself, and makes many of its difficulties disappear.[43]

SAME—FEDERAL QUESTIONS.

97. The first and second requisites above referred to being present, the jurisdiction extends to cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority. This class of questions is commonly called federal questions, and a federal question is involved not merely when the construction of a federal statute incidentally arises, but when the case necessarily turns upon the construction of the federal laws, as when the plaintiff would be defeated by one construction, or successful by another.

Under the statute, it is not sufficient that the suit must be at law or in equity, and must involve $2,000. In addition, one of several other conditions must concur: Either (1) the case must arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority;

[41] Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706; National Bank v. Allen, 90 Fed. 545, 33 C. C. A. 169.

[42] FISHBACK v. TELEGRAPH CO., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630.

[43] U. S. v. SAYWARD, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508.

or (2) it must be a controversy between citizens of different states; or (3) it must be a controversy between citizens of the same state claiming lands under grants of different states; or (4) it must be a controversy between citizens of a state and foreign states, citizens or subjects. These requisites must now be considered in their order.

Cases Arising under the Constitution or Laws of the United States, or Treaties Made or Which shall be Made under Their Authority.

If the case is of this nature, the federal court has jurisdiction independent of any question of citizenship. The two great branches of jurisdiction of the circuit court in ordinary controversies are, first, cases depending upon the nature of the controversy—that is, involving a federal question, as this branch is usually designated; and, second, cases depending upon the citizenship of the parties.

In another connection (the question of appeals from the state courts to the Supreme Court) it will be found that this term "federal question" is used in a rather more restricted sense than in the sense in which it is used as defining the jurisdiction of the federal circuit courts. In the latter class of cases, a case involves a federal question when its correct decision depends upon the construction of the federal Constitution or statutes, or when the plaintiff would be defeated by one construction or sustained by another.[44]

Pleadings must Show Federal Question.

In order for this ground of jurisdiction to exist, however, a mere general allegation that the plaintiff's case rests upon a construction of the federal Constitution or statutes is not sufficient. The facts in his pleading must show this. And it must also appear that the plaintiff's own case necessarily depends upon the construction of the federal Constitution or stat-

[44] LITTLE YORK GOLD WASHING & WATER CO. v. KEYES, 96 U. S. 199, 24 L. Ed. 656; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

utes. If it is not part of the plaintiff's case, he cannot give jurisdiction by anticipating in his pleading the defense which he expects the defendant to make, and stating that such defense turns upon a federal question. It must be part of the plaintiff's own case.[45]

If, however, it does appear from the plaintiff's pleading that a federal question is involved, the jurisdiction of the court is not defeated by the fact that other nonfederal questions may also be involved.[46]

The jurisdiction depends upon the plaintiff's allegations, not upon the construction which the defendant gives them.[47]

As a general rule, the jurisdiction is dependent upon the plaintiff's own statement; but if the plaintiff puts in a federal question which has not even a color of merit, or if he raises a federal question, and the defendant by his answer admits his construction of it, the court may dismiss the suit of its own motion under another section of the act, which permits it to do so whenever it appears that a case giving the federal courts jurisdiction is not necessarily involved.[48]

Some concrete instances of suits involving federal questions

[45] FLORIDA C. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766; Western Union Telegraph Co. v. R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; Arkansas v. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; Boston & M. Consol. Copper & Silver Min. Co. v. Ore Purchasing Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; TENNESSEE v. BANK, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

[46] New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96; St. Paul, M. & M. R. Co. v. Railway Co., 68 Fed. 2, 15 C. C. A. 167; 18 Sup. Ct. 946, 42 L. Ed. 1212.

[47] Central Ry. of New Jersey Co. v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949.

[48] White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569; McCain v. Des Moines, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936; Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

may make this clear, bearing in mind that the plaintiff's pleading must show the necessary jurisdictional facts. It is well settled that a suit against a corporation organized under an act of Congress itself necessarily involves a federal question, and can be brought in the federal courts, if the other requisites of jurisdiction concur.[49]

So a suit on the bond of a United States marshal for an illegal seizure of goods under a writ of the United States court involves a federal question.[50]

So, too, a suit on a clerk's bond, brought by a private suitor, which raises the question whether the sureties on the bond were liable for money paid into court on a tender, involves a federal question.[51] So a suit by a materialman against the sureties on a government contractor's bond.[52]

A suit to determine the validity of the consolidation of two railway companies, authorized by act of Congress, involves a federal question.[53]

Suits to restrain the collection of taxes alleged to violate the constitutional provision as to due process of law are quite frequent in the federal courts. If they turn upon the question whether the state law under which the tax is assessed is a violation of the federal Constitution, they involve a federal question. If it is a mere question whether they involve a conflict of a state law with the state Constitution, of course, they do not involve a federal question.[54]

[49] Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

[50] Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314.

[51] Howard v. U. S., 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754.

[52] 28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]; Mullin v. U. S., 109 Fed. 817, 48 C. C. A. 677.

[53] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482.

[54] Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Wheeler v. Railroad Co., 178 U. S. 321, 20 Sup. Ct. 949, 44 L. Ed. 1085; McCain v. Des Moines, 174 U. S. 168, 19 Sup. Ct.

In order for the federal court to have jurisdiction, it must not only involve a federal question, but it must be a suit of which the court can take jurisdiction. If, for instance, it is a suit to enjoin a tax, and of such a character that an equity court has no jurisdiction, then the federal equity court cannot take jurisdiction.[55]

A very common character of controversy is that class in which state legislation is alleged to violate the obligation of contracts. This is undoubtedly a federal question. There are numerous illustrations of this question in cases which have gone to the Supreme Court, and cases involving the right of cities, after having given one waterworks company or gas company the right to supply them with water, to give the same right to subsequent companies, or to undertake the supply themselves.[56]

Another instance is where it is claimed that subsequent legislation infringes an exemption from taxation conferred by a charter.[57]

The question what effect a federal judgment has as a lien by virtue of state or federal statutes, when such judgment is a necessary link in a chain of title, is a federal question.[58]

But the mere fact that suit is brought upon a judgment of a federal court does not make it a federal question.[59]

Many cases involving federal questions arise out of the federal control or influence over navigable waters. The question

644, 43 L. Ed. 936; West v. Louisiana, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965.

[55] Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651.

[56] Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; St. Tammany Waterworks Co. v. Waterworks Co., 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563.

[57] Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410.

[58] Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209.

[59] Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261.

whether certain structures are obstructions to navigation in waters claimed to be so navigable as to fall under the jurisdiction of the United States, and the question as to the right to erect a dock claimed by virtue of an act of Congress, are federal questions.[60]

Suits based upon the interstate commerce act, or the commercial clause of the Constitution, involve federal questions.[61]

National Banks.

It has been stated above that suits against corporations organized under acts of Congress per se involve federal questions. Independent of statute, this would be true as to suits against national banks, but Congress has seen fit to provide expressly that the federal courts should not have jurisdiction in suits against national banks under any other circumstances than such as they would have in cases against individual citizens of the same state.[62]

Under this, the mere fact that the suit is against a national bank does not give jurisdiction. But if the question raised in the suit is such as would constitute a federal question independent of the mere fact that the defendant is a national bank, the court would have jurisdiction. For instance, the question whether a national bank which had acquired stock in a state bank, and was sued as a stockholder, had a right to acquire such stock, or whether it was acquired in the regular course of business, constitutes a federal question, and gives jurisdiction.[63]

On the other hand, where a stockholder of a national bank had sold his stock, and the purchaser had failed to transfer it, in consequence of which the vendor remained as a stockholder on the books of the bank, and was sued after the failure of the

[60] U. S. v. Boom Co., 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437; Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525.

[61] Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

[62] Act Aug. 13, 1888, c. 866, 25 Stat. 436 [1 U. S. Comp. St. 1901, p. 514]; CONTINENTAL NAT. BANK v. BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119.

[63] California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

bank for his stock assessment, a suit by him against the purchaser for failing to transfer did not involve a federal question.[64]

A suit based on the refusal of election officers to receive a vote at a congressional election is essentially a suit arising under the federal Constitution, of which the court has jurisdiction, even though it may subsequently decide that there is no merit in the contention.[65]

It is not enough, however, in order to confer a federal question, that some act of Congress or title claimed under the United States may be incidentally involved. The case must turn necessarily upon the construction of a federal question. This is well illustrated by controversies arising out of patents. If the jurisdiction is invoked on the ground of an infringement, then a federal question is involved; but if, on the other hand, the controversy is simply over contracts arising out of grants of the right to sell patents, and turns upon the construction of these contracts between the parties, a federal question is not involved, even though the subject of litigation is a patent.[66]

[64] Le Sassier v. Kennedy, 123 U. S. 521, 8 Sup. Ct. 244, 31 L. Ed. 262; Ex parte Jones, 164 U. S. 691, 17 Sup. Ct. 222, 41 L. Ed. 601.

[65] Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005. It is interesting to compare this case with the case of Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910, in order to ascertain how far the jurisdiction of the court is defeated by the defendant's pleading. The true distinction appears to be that if the claim of the plaintiff is bona fide and appears clearly upon his bill, and that claim is not formally admitted by the pleadings, the court has jurisdiction, even though the facts in the case, on the plaintiff's own proof, should show that his claim is not well founded. But if the claim as set up by him is formally admitted on the pleadings, then there is no controversy between the parties involving a federal question, and the court may consider this as showing a want of federal jurisdiction.

[66] Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569; Pratt v. Coke Co., 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

Nor is a federal question involved simply from the fact that suit is brought against a receiver appointed by a federal court. The basis of the suit itself must involve a federal question, and the mere fact that a federal receiver is sued is not sufficient to give jurisdiction.[67]

Nor is it sufficient to constitute a federal question that the title in litigation traces back to the United States, where no question of the effect of the federal link in the title is involved, but merely conflicting questions of title between diverse claimants.[68]

SAME—CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES—NATURAL PERSONS.

98. The other requisites concurring, the jurisdiction extends to cases involving controversies between citizens of different states. The word "citizen," in this connection, is not used in the political sense of a voter, but in the sense of being a permanently domiciled member or subject of a state. Citizenship of the state and of the United States must both concur.

In considering what is meant in the Constitution and statutes by "citizens of different states," the question will first be discussed as to natural persons.

The word "citizen" is not used in this connection in its political sense, or in reference to any political rights, like the right to vote. It is used in the sense of its original definition; that is, as an integral part of the membership of a state, or a subject of a state. It means those who have a permanent domi-

[67] Bausman v. Dixon, 173 U. S. 113, 19 Sup. Ct. 316, 43 L. Ed. 633; Gableman v. Railroad Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220.

[68] St. Paul & N. P. Ry. Co. v. Railroad Co., 68 Fed. 2, 15 C. C. A. 167; Id., 18 Sup. Ct. 946, 42 L. Ed. 1212; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 20 Sup. Ct. 715, 44 L. Ed 872; Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575.

cile in a state, and not those who may merely have a temporary residence there. The distinction between "domicile" and "residence" is well known in the law. The meaning of "domicile" is explained in the case of Mitchell v. U. S.[69] It is defined as a "residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time; and, when once acquired, it is presumed to continue until positive proof of change." In order to give jurisdiction to the federal courts on this ground, two things must concur: The parties must be citizens of a state, in the sense of being regularly domiciled in that state, and not having a mere temporary residence there; and they must also be citizens of the United States, within the requirements of the fourteenth amendment, which provides that all persons born or naturalized in the United States are citizens of the United States and of the state where they reside. A party may be a citizen of the United States, and yet the federal courts would not have jurisdiction on the ground of citizenship. For instance, a person having his permanent abode in the District of Columbia is a citizen of the United States, but the federal courts have no jurisdiction on the ground of citizenship where he is on one side of a controversy, as the District of Columbia is not a state.[70]

On the same principle, a party regularly domiciled in a territory is a citizen of the United States, but he is not a citizen of a state, and therefore cannot give jurisdiction to the federal courts.[71]

On the other hand, a party may be regularly domiciled in a state, and a citizen of a state in the political sense of the word, and yet the federal courts would not have jurisdiction unless he is also a citizen of the United States. For instance, an alien

[69] 21 Wall. 350, 22 L. Ed. 584.

[70] Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049.

[71] City of New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535.

who has never been naturalized cannot be a proper party to a suit in the federal courts based on the ground of diverse citizenship, even though the state may have given an unnaturalized alien the right to vote.[72]

That citizenship of the United States alone is not sufficient to confer jurisdiction is well settled.[73]

Mere residence is not sufficient to confer jurisdiction, but domicile is required.[74]

The fact that citizenship, in this connection, does not mean political citizenship or the right to vote, is illustrated by the fact that even women who have no right to vote can still sue in the federal courts on the ground of diverse citizenship, and the same rule applies to infants.[75]

In considering the question of domicile, the ordinary rules of law in reference to the domicile of different parties apply. For instance, the domicile of a child is that of the parent.[76]

An interesting case on this point is Lamar v. Micou,[77] which holds that the infant's domicile was that of the father or the widowed mother, but did not change, when the mother remarried, to the domicile of the second husband, nor to that of a guardian at a mere temporary residence of the child. So, too, the domicile of the wife is that of the husband where they are not living apart under a legal separation.[78]

The rules of evidence in relation to proof of domicile are peculiar. It may often be proved by declarations, provided

[72] Poppenhauser v. Comb Co. (C. C.) 14 Fed. 707; Lanz v. Randall, Fed. Cas. No. 8,080.

[73] Nichols v. Nichols (C. C.) 92 Fed. 1.

[74] Wolfe v. Insurance Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; Neel v. Pennsylvania Co., 157 U. S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654; Collins v. Ashland (D. C.) 112 Fed. 175.

[75] Minor v. Happersett, 21 Wall. 162, 169, 22 L. Ed. 627; Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427.

[76] Dresser v. Illuminating Co. (C. C.) 49 Fed. 257.

[77] LAMAR v. MICOU, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751.

[78] Nichols v. Nichols (C. C.) 92 Fed. 1.

the court is satisfied that the declaration was not made for the purpose of manufacturing evidence on the subject.[79]

A domicile may be actually acquired, and, even if acquired for the purpose of enabling the party to sue in the federal courts, it is still his domicile, and entitles him, under such circumstances, to sue; but, if the change of domicile is merely colorable, the court will dismiss any suit of its own motion.[80]

Of course, a state cannot sue in the federal courts on the ground of diverse citizenship, as a state cannot, in the nature of things, be a citizen of a state.[81]

In considering the parties for the purpose of jurisdiction, the court looks at the character of the party on the record who is the actual dominus litis, not at mere nominal parties or parties beneficially interested. For instance, where a bond is made payable to a state or marshal, any suit brought by the party interested in the breach of the bond as relator is governed by his citizenship, and not by the citizenship of a formal payee, who has no actual interest in the suit.[82]

For the same reason, where a suit is brought by a party in a representative character, his citizenship, and not that of the parties for whose benefit the suit is really brought, is the test. An illustration of this is a suit by a trustee, in which case his citizenship, and not that of the beneficiaries, governs.[83]

So, in a suit by an administrator, his citizenship, and not that of the beneficiaries in the estate, is the test.[84]

[79] Doyle v. Clark, Fed. Cas. No. 4,053.

[80] Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825.

[81] STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231.

[82] Indiana v. Glover, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243; Wade v. Wortsman (C. C.) 29 Fed. 754; State of Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822.

[83] Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427.

[84] Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538.

The same principle applies to the suit of a guardian for the benefit of his ward, where the guardian can sue in his own name.[85]

On the other hand, a suit by a minor through his next friend is regulated by the citizenship of the minor, as a next friend is strictly hardly a party to the suit at all.[86]

Another well-settled principle of federal jurisprudence is that, if the relation of the parties is such at the institution of suit as to give the court jurisdiction, the substitution of new parties, or the change of residence of the old parties, will not divest a jurisdiction once acquired.[87]

[85] Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245.

[86] Blumenthal v. Craig, 81 Fed. 320, 26 C. C. A. 427.

[87] Hardenbergh v. Ray, 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93; Collins v. Ashland (D. C.) 112 Fed. 175.

CHAPTER XI.

THE CIRCUIT COURT (Continued)—ORIGINAL JURISDICTION (Continued).

99. Same—Same—Corporations.
100. Same—Same—Plurality of Litigants.
101. Same—Controversies between Citizens of the Same State Claiming Lands under Grants of Different States.
102. Same—Controversies between Citizens of a State and Foreign States, Citizens, or Subjects.
103. Same—Venue of Actions.
104. Same—Same—Rule When Litigants are Numerous.
105. Same—Same—Suits against Defendants of Different Districts in Same State, and Suits in Rem.
106. Same—Jurisdiction as Affected by Assignment.

SAME—SAME—CORPORATIONS.

99. For purposes of federal jurisdiction a corporation is considered a citizen of the state which gives it its charter.

Frequently corporations hold legislative power from more than one state. In such case a mere license or enabling act does not make it a corporation of the second state also.

1. *How Far a Citizen of the State Creating It.*

At the time of the adoption of the federal Constitution the part played by corporations in the business of the country was slight. It is a matter of great doubt whether the framers of the Constitution had them in mind at all. Consequently, when the question was first raised whether a corporation was a citizen in the sense in which that term was used in reference to the jurisdiction of the federal courts, it was decided that a corporation could only be treated as a citizen, for the purposes of jurisdiction, in case all the corporators composing the cor-

poration were citizens of the state of its creation, and this was a matter of averment and proof in each case.[1]

This remained the doctrine for a great many years, but the increasing importance of corporations rendered it necessary for the court to consider the question more thoroughly, and consequently, in the case of Louisville, C. & C. R. Co. v. Letson,[2] the Supreme Court based the jurisdiction of the federal courts over corporations on the theory that the corporation was itself an inhabitant of the state of its creation, contracting in its own name, and having a legal existence independent of its membership.

It has been shown in a previous chapter that the word "citizen" is not used in its political sense, but means a person with a permanent domicile, or a subject. Hence, when this last test was laid down by the court, it came pretty close to the doctrine which had been applied in the case of individuals. But not content with this, the court did not take long to go a step further to the final conclusion that after all, when a corporation is chartered by a state, there is a conclusive presumption that its corporators are all citizens of the same state; that, properly speaking, the individual stockholders are not parties at all, but that the corporation stands in the position of their representative or trustee; and hence an averment that a corporation is incorporated under the laws of a certain state shows that it has a domicile in or is a subject or citizen of that state.[3]

The test laid down in this latter case is that, in order to make a corporation a citizen in the spirit and letter of the Constitution, it must be created out of natural persons whose citizenship of the state creating it could be imputed to the corporation itself. Hence it follows, from the ground on which

[1] Bank of U. S. v. Deveaux, 5 Cranch, 61, 3 L. Ed. 38; Commercial & R. Bank of Vicksburg v. Slocomb, 14 Pet. 60, 10 L. Ed. 354.

[2] 2 How. 497, 11 L. Ed. 353.

[3] Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953; ST. LOUIS & S. F. R. CO. v. JAMES, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802.

these decisions have rested, that the allegation that a corporation is a citizen of a state is meaningless, but the allegation should be that it is a corporation organized under the laws of that state.[4]

The principle of this line of decisions applies as well to foreign corporations as to those organized under the laws of a state. They, too, are conclusively presumed to be composed of citizens or subjects of the foreign government creating them.[5]

Under the acts of July 12, 1882, March 3, 1887, and August 13, 1888,* a national bank, for purposes of jurisdiction, is treated as a corporation of the state in which it is located.[6]

But these principles apply only to corporations. They do not apply to unincorporated associations, or even to joint-stock companies which are not so organized as to amount to corporations.[7] Nor do they apply to limited partnership associations so long as they are not imbued with the character of corporations.[8]

Status of Corporations under Legislation of More than One State.

This is one of the most difficult questions in federal jurisprudence. Its difficulty arises from the fact that whether the corporation is a corporation of one state or the other, or of both states granting them privileges, is a question of legislative intent, dependent largely upon the statute to be passed upon in

[4] Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519, 19 C. C. A. 551.

[5] National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87.

* U. S. Comp. St. 1901, pp. 3457, 514.

[6] Petrie v. Bank, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144; Ex parte Jones, 164 U. S. 691, 17 Sup. Ct. 222, 41 L. Ed. 601; CONTINENTAL NAT. BANK OF MEMPHIS v. BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119.

[7] Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800.

[8] Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

each case. There are, however, certain general principles which at least aid in considering any special case.

It is well settled that the mere grant to a corporation already organized under the laws of one state of a privilege or license by another state does not constitute it a corporation of the second state. Even where the legislation of the second state goes so far as to require the corporation to file its charter in some office of the second state and agree to be considered a domestic corporation of that state, it still remains a corporation of the first state, and the legislation of the second state is not construed as amounting to incorporation.[9]

So, too, where the second state recites the charter granted by the first state, and goes on to give the same powers and impose the same duties, that is construed as a mere license, and not as creating a new corporation.[10]

In order for the legislation of the second state to constitute a new corporation of that state, the language used must go so far as to imply actual creation, not a mere recognition of a previous creation.[11]

On the other hand, when the intent of the second state to create a new corporation is clear, the effect is, in contemplation of law, that there are two corporations. There is, first, the corporation of the original state, which owes its existence to that state, and cannot be regenerated by another state; and there is, second, the new corporation of the second state, owing its existence and allegiance to the second state. These two corporations may in name be one, may have the same stockholders, own the same property, and even be operated as a unit,

[9] ST. LOUIS & S. F. R. CO. v. JAMES, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; SOUTHERN R. CO. v. ALLISON, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078.

[10] Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

[11] Pennsylvania R. Co. v. Railroad Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83.

but they still retain their character as distinctive and separate corporations.[12]

The character of legislation which will constitute an additional corporation is well illustrated by the case of Memphis & C. R. Co. v. Alabama.[13] In this case a railroad had already been chartered in Tennessee, but by an act of the Legislature of Alabama a corporation under the same name was authorized to take subscriptions to capital stock in Alabama, required to have a place for the stockholders to meet in Alabama, and to do various other things consistent only with the idea of its being an Alabama corporation. When it was sued in Alabama on a tax question arising under the laws of Alabama, the Supreme Court held that the intent of the Legislature of Alabama to make a separate corporation was clear, and that as to such a procedure it must necessarily be considered a corporation of Alabama, and hence could not remove the case into the federal courts on the ground of its being a nonresident.

Where there is double legislation by two states, even though the legislation of the second state may amount to incorporation, the original corporation organized by the first state still remains.[14]

Difficult questions under this branch of jurisdiction arise when corporations of different states are consolidated. In such case each corporation, as a rule, retains its original citizenship, and, when sued, the corporation is supposed to be a corporation of the state where it was sued, and hence could not be sued by a citizen of that state.[15] But when a new corporation is organized, and the old corporations, under a consolidation agreement, convey their properties to the new corporation and

[12] Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130.

[13] 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518.

[14] Louisville, N. A. & C. R. Co. v. Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081.

[15] Baldwin v. Railroad Co. (C. C.) 86 Fed. 167; Smith v. Railroad Co. (C. C.) 96 Fed. 504.

wind up, then the new corporation is treated as a citizen of the state which organizes it.[16]

When a corporation acting under the laws of two states brings a suit, the question as to its citizenship depends on the question which of the original corporations is actually suing; for if, in contemplation of law, there are still two separate corporations, and the corporation first organized remains a corporation of the original state and loses no rights by going into another state, then, clearly, in such case, it may be the original corporation which is suing, and not the corporation of the second state. This doctrine is illustrated by comparing the two cases of Ohio & M. R. Co. v. Wheeler [17] and Nashua & L. R. Corp. v. Boston & L. R. Corp.[18] In the first a corporation describing itself as created by the laws of the states of Indiana and Ohio, and having its principal place of business in Ohio, and a citizen of Ohio, sued a citizen of Indiana in the Indiana federal court. The Supreme Court held, on this allegation of the pleadings, that it was not a single corporation under the joint laws of Ohio and Indiana, but that there were, in contemplation of law, two separate corporations, one conclusively presumed to be composed of citizens of the state of Ohio, and the other conclusively presumed to be composed of citizens of the state of Indiana. Hence it was the same thing as if a citizen of Ohio and a citizen of Indiana sued a citizen of Indiana in the federal courts, and thus, as citizens of Indiana were on two different sides of the controversy, it was not a case of which the court had jurisdiction. On the other hand, in the second case, the Nashua Corporation, alleging itself to be a corporation of the state of New Hampshire, sued a corporation of the state of Massachusetts. It appeared from an examination of the legislation of the two states that a corporation had been chartered by the state of New Hampshire composed of seven corporators, and subsequently a corporation of the same name by

[16] Westhelder v. Railroad Co. (C. C.) 115 Fed. 840.
[17] 1 Black, 286, 17 L. Ed. 130.
[18] 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363.

the state of Massachusetts composed of three of these same corporators, and that by subsequent legislation the stockholders and property of the two corporations were blended into one for all practical operating purposes. The Supreme Court held, however, that it had to consider that it was a New Hampshire corporation which was suing, and not the Massachusetts corporation, and hence that the federal court for the district of Massachusetts had jurisdiction.

SAME—SAME—PLURALITY OF LITIGANTS.

100. In the case of more than one plaintiff or defendant, the federal jurisdiction cannot be acquired by diverse citizenship when any one or more of the parties on either side is a citizen of the same state as any one or more on the other side; but only a party can defeat the jurisdiction who is an indispensable party to the suit, and the omission of parties not indispensable is authorized by statute in aid of the federal jurisdiction.

Jurisdiction as Affected by the Number of Litigants.

Heretofore the discussion has been on the theory that there is but one party on each side of the litigation. A much more numerous class is where there is more than one litigant on each side. In this case it is well established as a doctrine of the federal courts that the terms "plaintiff" and "defendant" are used collectively, and mean that all the plaintiffs must be capable of suing all the defendants; that is, that all the parties on each side of the litigation must be of different citizenship. Hence a citizen of New York and a citizen of Massachusetts cannot sue a citizen of Massachusetts in the federal courts, as that would not be a controversy between citizens of different states.[19]

[19] Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. Ed. 435; Peninsular Iron Co. v. Stone, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1030; FLORIDA CENT. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486.

The jurisdiction, however, depends only upon those who are indispensable as parties, and in order to obviate, as far as possible, the inconvenience of having the jurisdiction defeated, section 737 of the Revised Statutes [20] reads as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

It will be observed that this authorizes the omission of parties only on the ground of their absence from the jurisdiction and the inability to reach them with process, but not to a case where they are necessary parties and in reach of process.

For instance, in the case of Allnut v. Lancaster,[21] there were 114 defendants, all in reach of the court's process, and it was held that in such case it was necessary to make them parties. This statute applies both to common law and equity, and authorizes the omission even of those who would, under ordinary rules of practice, be considered as necessary parties, provided the decree, when rendered, does not so change the state of affairs as to injuriously affect the interests of the absent party. Hence, in the case of Clearwater v. Meredith,[22] it was held that where there were four guarantors in a contract, one of whom was out of the jurisdiction, the other three could be sued and the absent one could be omitted, as in such case the judgment

[20] 1 U. S. Comp. St. 1901, p. 587.

[21] (C. C.) 76 Fed. 131. See, also, Shearson v. Littleton (C. C.) 105 Fed. 533; Reese v. Zinn (C. C.) 103 Fed. 97.

[22] 21 How. 489, 16 L. Ed. 201.

would not bind him, and he would still be free to defend just as if no suit had ever been brought against the others. So, in Inbusch v. Farwell,[23] a suit against the administrator of one partner and two sureties on a bond signed by them, and also by two other partners, was sustained, the other partner being inaccessible. But where the omitted parties are what may be termed indispensable parties, being so necessary that a decree without their presence would prejudice their rights and leave the case in a shape contrary to equity and good conscience, the statute does not apply, and the jurisdiction of the court would not attach.[24]

In addition to the above statute, the forty-seventh equity rule provides as follows:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the case without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

This rule, however, applies only to equity, and not to common-law cases. It is broader than the statute above quoted, because it applies not only to a defect of parties, due to their being out of reach of process, but also even to parties within the reach of process, whose joinder would oust the jurisdiction of the court. Under this rule and the above statute, parties in the federal courts need not be so numerous as in the ordinary chancery courts, and many who would ordinarily be made parties are not necessarily so made in the federal courts. The leading case on this subject is Shields v. Barrow.[25] This case

[23] Inbusch v. Farwell, 1 Black, 566, 17 L. Ed. 188.

[24] Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

[25] SHIELDS v. BARROW, 17 How. 139, 15 L. Ed. 158.

classifies parties in the federal courts into formal, necessary, and indispensable, holding that only the latter class are the ones whose absence would completely defeat the jurisdiction. Even parties who are ordinarily considered necessary parties would not defeat the jurisdiction of the federal court, if the court can proceed without prejudicing their rights or leaving the record at final decree in a shape contrary to equity and good conscience.

Substantially the same rule is laid down in Williams v. Bankhead,[26] where the court says: "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule, arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation, he may be a party, or not, at the option of the complainant."

An illustration of parties who are merely formal in the sense of this statute and rule is given by the case of Walden v. Skinner.[27] In this case the executors of a trustee, who were joined for the mere purpose of conveying a title, but against whom no personal relief was prayed, were held to be merely formal.

[26] 19 Wall. 563, 22 L. Ed. 184. See, also, Minnesota v. Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499.

[27] 101 U. S. 577, 25 L. Ed. 963.

So, too, in Einstein v. Georgia Southern & F. R. Co.,[28] where two of three trustees sued as plaintiffs, and another refused to join and was therefore made defendant, he was held to be only a formal party. It is a well-established doctrine of the federal courts that an ordinary trustee, unless the instrument creating him is very restricted in conferring powers upon him, represents the beneficiaries, and therefore the latter are not necessary parties.[29]

When a trustee is made a party defendant and no relief is prayed against him, he would not defeat the jurisdiction; but where there are charges against him, and therefore relief is prayed, he is a necessary party, and would defeat the jurisdiction if it places two citizens of the same state on opposite sides.[30] There are, however, many cases where parties have been held indispensable and their joinder defeats the jurisdiction on that account. In Williams v. Bankhead [31] the claimant of a fund was held to be a necessary party. So in Massachusetts & S. Const. Company v. Cane Creek Tp., which was a suit to recover bonds in the possession of a third party, raising certain questions as to the contract under which they were placed with that party, it was held that the custodian of the bonds, though only a stakeholder, was an indispensable party.[32]

In many cases a jurisdiction may be given by dismissing the suit as to parties who would otherwise defeat it.[33]

[28] (C. C.) 120 Fed. 1008.

[29] Kerrison v. Stewart, 93 U. S. 155, 23 L. Ed. 843; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501.

[30] Post v. Buckley (C. C.) 119 Fed. 249.

[31] 19 Wall. 563, 22 L. Ed. 184.

[32] Massachusetts & S. Const. Co. v. Township, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518.

[33] Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; Mason v. Dullagham, 82 Fed. 689, 27 C. C. A. 296; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99; Delaware, L. & W. R. Co. v. Frank (C. C.) 110 Fed. 689.

In deciding upon the jurisdiction, the court does not consider itself bound by the arrangement which the pleader has chosen to give the parties on the record. It will arrange them according to their actual interest, and then decide whether the jurisdiction can be sustained.[84]

SAME—CONTROVERSIES BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES.

101. The other requisites concurring, the federal jurisdiction extends to cases involving controversies between citizens of the same state claiming lands under grants of different states.

The reason for conferring most classes of jurisdiction upon the federal courts is to protect those whose rights depend upon federal statutes, or who are nonresidents, from local influences and prejudices. Hence it is as important to confer this jurisdiction where the source of title might create prejudice, as where friends of the local tribunal or juries are opposed to strangers.

At the time of the adoption of the Constitution, conflicting land grants among the several states were quite common. The relative boundaries of the states in relation to each other were not well settled, and when new states were formed there were often serious difficulties as to whether the grant from the old state or the grant from the new state was a valid one. It was soon decided that the federal courts had jurisdiction in cases of conflicting grants between an old and a new state, although the grant of the old state was made before the new state was formed. This was decided in the case of conflicting grants from New Hampshire and Vermont, where the New Hampshire grant was made at a time when Vermont was still a part of

[84] Pacific R. Co. of Missouri v. Ketchum, 101 U. S. 289, 25 L. Ed. 932; First Nat. Bank v. Trust Co., 80 Fed. 569, 26 C. C. A. 1; Johnson v. Ford (C. C.) 109 Fed. 501; Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 57 C. C. A. 64.

New Hampshire.[35] This source of litigation, however, has long since lost its importance.

SAME—CONTROVERSIES BETWEEN CITIZENS OF A STATE AND FOREIGN STATES, CITIZENS, OR SUBJECTS.

102. The other requisites concurring, the federal jurisdiction extends to cases involving controversies between citizens of a state and foreign states, citizens, or subjects.

A foreign state may sue in the courts of another country, and it would be a breach of international courtesy not to allow it so to do.[36]

An illustration of a suit by a foreign state is given in the case of Republic of Colombia v. Cauca Co.,[37] which was a suit by the republic of Colombia to set aside an award of arbitrators.

Citizens or subjects of foreign states are usually designated in the cases as aliens, although that is not the language of the statute. The court has jurisdiction of a suit under this clause, although the alien sued or suing resides in the United States,[38] and though the plaintiff is not a citizen of the state where suit is brought.[39]

For the purposes of jurisdiction under this clause, a foreigner remains an alien until he is completely naturalized. He does not become a citizen by taking out his preliminary naturalization papers, even though the state laws give such a party the right to vote.[40]

[35] Pawlet v. Clark, 9 Cranch, 292, 3 L. Ed. 735.

[36] The Sapphire v. Napoleon III, 11 Wall. 164, 20 L. Ed. 127.

[37] Republic of Colombia v. Cauca Co. (C. C.) 106 Fed. 337; Id., 113 Fed. 1020, 51 C. C. A. 604; Id., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159.

[38] Breedlove v. Nicolet, 7 Pet. 413, 8 L. Ed. 731.

[39] BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

[40] City of Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31.

On the other hand, a citizen of the United States does not become an alien by a mere change of residence from the United States. It must appear that the change is permanent, and that an obligation to the new sovereign has been distinctly assumed.[41]

If, however, a female citizen of the United States marries a Canadian and goes with him to his permanent home, her national character is determined by her husband's residence, and she becomes a subject of Great Britain.[42] On the other hand, a female citizen of the United States, by marrying a resident unnaturalized alien, does not thereby become an alien herself, they continuing to reside in the United States.[43]

The court has also decided that a citizen of Cuba after the Spanish War is a citizen of a foreign state, notwithstanding the close relations between that country and the United States. She is Cuba Libre.[44]

In view of the constant practice of nations to appoint citizens of other nations as consuls, there is no presumption that a person so appointed by a foreign country is an alien.[45]

This clause of the statute gives jurisdiction simply between citizens of this country and foreign states, citizens, or subjects. Hence it does not confer jurisdiction in controversies between citizens of two foreign states,[46] nor in controversies between citizens of foreign states and citizens of the District of Columbia, as the latter is not a state.[47]

Pleadings must Show the Jurisdiction.

The courts hold that an averment must clearly show that an alien is a citizen of a foreign power. In the case of Stuart v.

[41] Bishop v. Averill (C. C.) 76 Fed. 386; Winans v. Attorney General [1904] App. Cas. 287.

[42] Jenns v. Landes (C. C.) 85 Fed. 801.

[43] Comitis v. Parkerson (C. C.) 56 Fed. 556, 22 L. R. A. 148.

[44] Betancourt v. Association (C. C.) 101 Fed. 305.

[45] Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419.

[46] Pooley v. Luco (C. C.) 72 Fed. 561.

[47] Land Co. of New Mexico v. Elkins (C. C.) 20 Fed. 545.

City of Easton [48] the Supreme Court held that an averment that a party on whom jurisdiction depended was a citizen of London, England, was not sufficient for the purpose of jurisdiction. The opinion is very short, and it is not entirely clear wherein the defect consists. Probably it was that the averment simply showed citizenship of the city of London, but did not show necessarily that the party was a citizen or subject of Great Britain. Soon after this decision Judge Taft, speaking for the circuit court of appeals, held, in the case of Rondot v. Rogers Tp.,[49] that the proper averment should allege not only that the party was a subject, but also expressly that he was an alien, although, as above stated, the word "alien" is not used in the statute at all. But in the very recent case of Hennessy v. Richardson Drug Co.[50] the Supreme Court held that it was not necessary to expressly aver the alienage, and that an averment that the complainants were "all of Cognac in France, and citizens of the republic of France," was sufficient for the purposes of jurisdiction.[51]

SAME—VENUE OF ACTIONS.

103. Civil suits in the federal courts are to be brought in the judicial district whereof the defendant is an inhabitant, except that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit may be brought in the district of the residence of the plaintiff, if the defendant be found therein and served with process. This jurisdiction, however, being of the person and not of the subject-matter, any defects may be waived by the appearance of the defendant.

[48] 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341.

[49] 79 Fed. 676, 25 C. C. A. 145.

[50] HENNESSY v. DRUG CO., 189 U. S. 25, 23 Sup. Ct. 532, 47 L. Ed. 697.

[51] Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

Jurisdiction as Affected by Place of Suit.

The statute provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought in the district of the residence of either the plaintiff or defendant." The acts prior to the act quoted all provided that the suit should not be brought "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This last act, by omitting the right to sue in the district where a defendant may be found, materially changes the prior acts, and renders unimportant many decisions based upon them.

In considering this question as to the place of suit, it must first be observed that the requirement does not go to jurisdiction over the subject-matter, but merely to jurisdiction over the person, and hence it is a privilege which may be waived. If the controversy is between citizens of different states, or involves a federal question, or comes within any other of the provisos defining the jurisdiction over the subject-matter, the courts have jurisdiction of that subject-matter, even though suit may be brought in a district where neither the plaintiff nor the defendant resides; and in such cases a general appearance is a waiver of the right to object to jurisdiction over the person. Under the ordinary rules of pleading, a special appearance and a general appearance cannot be combined, but the latter is a waiver of the former; and hence a demurrer which sets up as a ground, not only the exemption from suit in that special district, but other grounds going to the merits, such as want of equity, is treated as a general appearance, and suit may be maintained. Any appearance, consent, or plea which amounts to a general appearance is undoubtedly a waiver of the question of jurisdiction.[52]

[52] ST. LOUIS & S. F. R. CO. v. McBRIDE, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Central Trust Co. v. McGeorge, 151 U. S. 129,

It is not a waiver of the jurisdictional privilege, or a consent to be sued in a certain district, for a defendant corporation to appoint an agent on whom process may be served, as required by state statute. Even though the corporation actually does business there, this does not give the right to sue it, so far as the jurisdiction depends upon the residence of the defendant.[53]

As this is a personal privilege, it ought to be very clear that only the party can plead it whose residence does not come within its requirements.[54]

This qualification upon the right to sue must be considered, first, in controversies not dependent upon diverse citizenship, and, second, in controversies where the ground of jurisdiction is diverse citizenship.

Rule When Jurisdiction not Dependent on Diverse Citizenship.

In this case the residence or inhabitancy of the defendant alone confers jurisdiction.[55] It is plain from the language of the act that it was intended to refer only to the residence of citizens of the United States, and hence it does not apply to an alien defendant. If service can be gotten on an alien corporation, and the other requisites of jurisdiction concur, the court can take jurisdiction, though the corporation merely does business at the place where sued, and does not, as in the nature of things it cannot, reside there or become an inhabitant.[56]

On the other hand, when an alien is a plaintiff, then the

14 Sup. Ct. 286, 38 L. Ed. 98; Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401; Occidental Consol. Min. Co. v. Tunnel Co. (C. C.) 120 Fed. 518.

[53] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Platt v. Real Estate Co. (C. C.) 103 Fed. 705.

[54] Citizens' Bank & Trust Co. v. Gold Co. (C. C.) 106 Fed. 97; Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98.

[55] McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402.

[56] In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

jurisdiction is necessarily governed by the district of the defendant American citizen or corporation.[57]

As to the meaning of the term "resident or inhabitant," the Supreme Court has settled that. As there were many states which had more than one district, and it would be incongruous to say that a litigant was a citizen of a district, the two words are practically synonymous, and mean the regular home or domicile of the party in question.[58]

A comparatively recent act of Congress requires surety companies to file a power of attorney in any district where they give a bond, before they can give bonds to the United States or in the United States courts.[59] Under this act it has been held that it constitutes an exceptional case, and that a surety company may be sued under such circumstances wherever it gives a bond.[60]

When Jurisdiction Dependent on Diverse Citizenship.

In this case the suit may be either in the district of the residence of the plaintiff or of the defendant. It cannot, however, be in the residence of the plaintiff unless legal service can be secured on the defendant.[61] And, in the case of a corporation, legal service cannot be obtained upon it, if it does not carry on business in a district, by merely serving one of its officers who happens to be a resident there.[62] Hence, as to nonresident defendants, they can be sued in the district of the plain-

[57] Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

[58] Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; Freeman v. Surety Co. (C. C.) 116 Fed. 548.

[59] 28 Stat. 279 [U. S. Comp. St. 1901, p. 2315].

[60] U. S. v. Sheridan (C. C.) 119 Fed. 236.

[61] Barnes v. Telegraph Co. (C. C.) 120 Fed. 550; Gale v. Association (C. C.) 117 Fed. 732.

[62] Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113.

tiff; but they cannot be sued in a district where neither plaintiff nor defendant resides, even though they carry on business there, and even though a federal question or other requisite of general jurisdiction may exist.

SAME—SAME—RULE WHEN LITIGANTS ARE NUMEROUS.

104. When the plaintiffs or defendants are numerous, all the plaintiffs must be residents of the district where the suit is brought, if the jurisdiction is based upon the residence of the plaintiffs; or all the defendants must be residents of the district where the suit is brought, if the right to sue is based upon the residence of the defendants, provided that no party not indispensable shall defeat the jurisdiction.

Following analogies laid down in the cases regulating the general question of jurisdiction between citizens of different states, it is now well settled that, when the plaintiffs or defendants are numerous, all the plaintiffs must be residents of the district where the suit is brought, if the jurisdiction is based upon the residence of the plaintiffs; or all the defendants must be residents of the district where the suit is brought, if the right to sue is based upon the residence of the defendants.[68]

Following the decisions on the same general subject of jurisdiction, it is also well settled that this principle applies only to those who are indispensable parties; and it is presumed that, even after suit brought, jurisdiction could be sustained by dismissing as to any parties who are not indispensable and who otherwise might defeat jurisdiction. It is, perhaps, superfluous to add that this provision as to the place where suit must be brought is used in the statute merely in reference to the ordinary civil jurisdiction of the circuit and district courts, and hence does not apply to other classes of jurisdiction conferred on other courts. A libel in personam in the district court in ad-

[68] SMITH v. LYON, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Freeman v. Surety Co. (C. C.) 116 Fed. 548.

miralty may be maintained in a district other than the residence of the defendant, and the ancient process of the admiralty courts may be resorted to in order to bring the defendant into court.[64]

SAME—SAME—SUITS AGAINST DEFENDANTS OF DIFFERENT DISTRICTS IN SAME STATE, AND SUITS IN REM.

105. In suits not of a local nature, when there are two or more defendants in different districts of the same state, the suit may be brought in any district in which any defendant resides, and process will run into the other districts for the purpose of reaching any defendant in the district in which he resides.

In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him directed to the marshal of the district in which he resides.

Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in either of such districts.

In the case of suits to reach property of absent defendants in any district, certain proceedings in rem are provided for, enforceable by certain prescribed steps in the nature of an order of publication. These are mainly suits to enforce liens, or to remove clouds on titles.

Section 740 of the Revised Statutes† provides for suits not local in their nature. It reads as follows:

"When a state contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two

[64] In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991.

† U. S. Comp. St. 1901, p. 587.

or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state."

As to suits of a local nature, section 741 provides as follows:

"In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."

As to suits of a local nature, where the property lies in more than one district, section 742 of the Revised Statutes provides:

"Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

It is an unsettled question how far these statutes are repealed by the act of March 3, 1875, as amended by the act of 1887–88. The courts have held both ways on the subject.[65] It is certain that section 738, as amended by these recent acts, includes most of the cases covered by these statutes, but there are some

[65] New Jersey Steel & Iron Co. v. Chormann (C. C.) 105 Fed. 532; Goddard v. Mailler (C. C.) 80 Fed. 422; Seybert v. Railroad Co. (C. C.) 110 Fed. 810.

cases which they do not cover, and repeals by implication are not favored. It would seem that these statutes are still in force in particulars not covered by the latter act, and could be used, at least, for the purpose of providing a simple mode of service of process in addition to that given under this later act. The question, however, is unsettled.

The difference between local and transitory actions is well known in the law, and out of the range of the present discussion. The courts have held that an action of trespass for injuries to land is local in its nature, and triable only in the district where the land lies.[66] So with a suit to cancel a mortgage.[67]

Suits to Reach Property of Absent Defendants in the District.

Section 738 of the Revised Statutes, as enlarged by the act of March 3, 1875, and left unchanged by the acts of 1887–88, in relation to the jurisdiction of the federal courts,[68] provides as follows:

"Sec. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is

[66] Ellenwood v. Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913.

[67] Cowell v. Water Supply Co. (C. C.) 96 Fed. 769, reversed 121 Fed. 53, 57 C. C. A. 393, but not on this point.

[68] U. S. Comp. St. 1901, p. 513.

not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state: provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

This act is intended, in the cases covered by it, to regulate the suit by the location of the res; and consequently the district or residence of the plaintiff or defendant has nothing to do with it, though, of course, the controversy must be one of which the court has jurisdiction from diversity of citizenship or otherwise. Suit, however, may be brought where the property is, although neither of the parties resides there.[69] The statute covers many different kinds of suits.

[69] GREELEY v. LOWE, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

Suits to Enforce Any Legal or Equitable Lien upon or Claim to Real or Personal Property in the District.

It has been held that a suit to quiet title comes under this provision.[70] Also a suit for partition of land is treated as a claim to or suit to settle title to real estate.[71] So, also, a suit to reach a fund in the hands of a trustee in the jurisdiction of the court.[72] Suits to foreclose mortgages clearly come under the provision.[73] A suit to enforce a lien of a judgment on property within the district is covered by the statute;[74] so, also, an action of ejectment.[75]

Suits to Remove Any Incumbrance or Lien or Cloud upon the Title to Real or Personal Property.

A suit by a creditor of a corporation to set aside a conveyance made by the corporation comes under this provision of the act.[76] A suit to remove a cloud upon a title caused by a tax sale is covered by the act.[77] On the other hand, it is inapplicable to purely personal actions, as to suits to cancel contracts where no lien or claim or title to property is involved.[78] The act is intended to give the right to enforce claims or liens existing before the institution of the suit, and hence it does not cover proceedings by foreign attachment, where the only lien arises from the institution of the suit itself. It is well settled in the federal courts that the proceeding by attachment is a mere incident to a personal suit against the owner, and cannot be brought unless the defendant can be served legally with pro-

[70] U. S. v. Southern Pac. Co. (C. C.) 63 Fed. 481.
[71] GREELEY v. LOWE, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.
[72] Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229.
[73] Seybert v. Railroad Co. (C. C.) 110 Fed. 810.
[74] De Hierapolis v. Lawrence (C. C.) 99 Fed. 321.
[75] Spencer v. Stockyards Co. (C. C.) 56 Fed. 741.
[76] Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178.
[77] Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201.
[78] New York Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580.

cess.[79] Prior to the jurisdiction acts of 1887–88, process could be served on a defendant if found in a district, though he did not reside therein; under this last amendment this can no longer be done. On the other hand, even under this last amendment, suit can be brought within the district of the residence of the plaintiff, and accompanied by an attachment, if service can be obtained on the defendant. A suit for the specific performance of a contract has also been held not to come within the purview of this act, as a decree in such cases acts in personam, and not on the land and property itself.[80] A suit to restrain the enforcement of a contract of sale of stock by a corporation to certain other defendants as illegal does not come within the act, as there is no question of title or claim in such a case.[81] A suit by heirs against trustees under a will is not covered by the act.[82]

Procedure under the Act.

It is clear from the language of the act that if it is intended to repeal sections 740, 741, and 742, such a suit cannot be commenced by an ordinary process sent into another district, but it is first necessary, even as between two defendants of different districts in the same state, to follow the language of the act and secure an order from the court directing the absent defendant or defendants to appear, plead, answer, or demur by a time certain to be designated, and then to serve that order on the defendants, if practicable, and upon the person in charge of the property. If, however, those sections, as is believed to be the case, are still in force, the original process could be sent into another district in the same state and served. It is believed that this can be done, notwithstanding one decision to the contrary.[83] They ought, at least, to cover the case of de-

[79] EX PARTE DES MOINES & M. R. CO., 103 U. S. 794, 26 L. Ed. 461.

[80] Municipal Inv. Co. v. Gardiner (C. C.) 62 Fed. 954.

[81] Lengel v. Refining Co. (C. C.) 110 Fed. 19.

[82] Fayerweather v. Ritch (C. C.) 89 Fed. 385.

[83] Seybert v. Railroad Co. (C. C.) 110 Fed. 810.

fendants in different districts in the same state. If, however, original process cannot be served, and only the order of the court under this last act, such order can be sent not only into another district of the same state, but into any other part of the United States, and can be served upon the defendant, if practicable, wherever found.[84] It is therefore necessary, first, to make some effort to find the defendant, and to serve on him the order of the court requiring him to appear and defend himself, and also to serve it upon the person in charge of the property. Only after that is done would it be allowable to resort to the substituted service of publication, and the court will probably require some proof of an attempt to locate the defendant before allowing the substituted service. The act carries out the theory of proceedings in rem under constructive service, and makes it only binding as to the property itself in case there is no appearance. If there is an appearance, on the other hand, the suit becomes an ordinary suit in personam, and could be proceeded with by the plaintiff to a personal judgment.[85]

SAME—JURISDICTION AS AFFECTED BY ASSIGNMENT.

106. The assignee of a chose in action cannot sue in the federal courts unless his assignor could have sued there, except in certain cases named in the statute.

In addition to the qualification as to the right to sue in reference to residence of the plaintiff or defendant, there is a further qualification in the statute in reference to the character of the claim to be asserted. It provides:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in

[84] Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178.

[85] Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

The question what is meant by contents "of any promissory note or any other chose in action" has been considered by the Supreme Court more than once, and it is held to embrace the rights conferred by the instrument which were capable of enforcement by suit.[86]

The clause applies to any cause of action arising out of a contract and subsequently assigned. For instance, a suit to enforce specific performance of a contract cannot be brought by the assignee of such a cause of action unless the assignor also could have brought it.[87]

So a suit to enforce the lien of a judgment growing out of a contractual right of action cannot be brought by the assignee unless the judgment creditor also could have brought it.[88]

In the cases cited in the note, the Supreme Court limits its decision to judgments based upon causes of action growing out of contracts. It would seem, however, that the principle would apply also to an assignment of a judgment based on a cause of action springing out of a tort. It will be seen presently that the statute does not apply to a cause of action for a tort, but, when that cause of action is reduced to judgment, under ordinary principles the tort is merged in the judgment, and the judgment creditor then has a cause of action springing out of an implied contract. This question, however, cannot be considered as settled.

The statute applies also to suits by the assignee of warrants by a city not payable to bearer, and even to a purchaser of such

[86] Shoecraft v. Bloxham, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574.

[87] Corbin v. Black Hawk County, 105 U. S. 659, 26 L. Ed. 1136.

[88] Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052.

warrants at a sale held by an administrator of the original payee under an order of the probate court.[89]

It applies to notes payable to bearer, unless the maker is a corporation. In construing what notes are payable to bearer, it has been held that a note to the maker's own order, and indorsed by the maker in blank, is a note payable to bearer, and that the holder of such a note is not an assignee in the sense of the statute, the reason being that the cause of action by him in such case is necessarily original, as the maker and payee of the note is the same.[90]

But the statute does apply if the note is payable to any payee not the maker, and indorsed by such payee in blank, for there an additional party comes in.[91]

Notes made payable to ——— or bearer—that is, with the payee's name left blank—are payable to bearer in the sense of the statute.[92]

Coupons are also notes payable to bearer in the sense of the statute, although the bonds from which they are detached are not, for under the principles of the law merchant a coupon is an independent obligation.[93]

Under the statute, however, notes of corporations payable to bearer are excepted from its operations, so that the holder of such a note can sue in the federal courts independently of the citizenship of the original assignor. This principle, however, under the clear language of the statute itself, applies only to corporate notes payable to bearer, and not to corporate notes payable to order and indorsed.[94]

[89] City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Glass v. Concordia, 176 U. S. 207, 20 Sup. Ct. 346, 44 L. Ed. 436.

[90] Barling v. Bank, 50 Fed. 260, 1 C. C. A. 510.

[91] Thomson v. Elton (C. C.) 100 Fed. 145.

[92] Lyon County v. Bank, 100 Fed. 337, 40 C. C. A. 391.

[93] Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364.

[94] Thomson v. Elton (C. C.) 100 Fed. 145; Lake County Com'rs v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684.

Municipal corporations come within the language of the exception, and the holder of their notes, if payable to bearer, can sue independently of the citizenship of the assignor.[95]

This same principle applies to an Ohio township, which under their law is a corporation.[96]

Choses in Action.

This applies to any right of action springing out of a contract, as stated above; for instance, to a suit to compel specific performance of a contract for conveyance of land, which cannot be asserted in the United States court unless the assignor also could have sued.[97]

Under this term is included an assignment of water rents by a water company under a mortgage, with the right to collect the water rents as additional security. The assignee of such right of action cannot sue unless the assignor also could have sued.[98]

Causes of action springing out of tort, however, are not included in the choses in action mentioned by the statute, as they apply only to choses in action growing out of contractual rights. Hence the assignee of a cause of action springing from tort can sue in his own name independently of the citizenship of the assignor. Such can be done, for instance, in the case of an action of replevin.[99]

So an assignee of a right of action for trespass to real property can sue independently of the citizenship of his assignor.[100]

[95] City of New Orleans v. Quinlan, 173 U. S. 191, 19 Sup. Ct. 329, 43 L. Ed. 664.

[96] Loeb v. Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280.

[97] PLANT INV. CO. v. RAILROAD CO., 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358.

[98] City of Eau Claire v. Payson, 107 Fed. 552, 46 C. C. A. 466; American Waterworks & Guarantee Co. v. Water Co. (C. C.) 115 Fed. 171.

[99] Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084; Buckingham v. Dake, 112 Fed. 258, 50 C. C. A. 492.

[100] Ambler v. Eppinger, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765.

And the same principle applies to an assigned right of action against a bank for not protesting a draft sent to it by another bank for collection.[101]

Meaning of "Assignee."

The statute applies only to a cause of action existing in some one else and assigned. If the cause of action in its nature is inherent in the suitor, the form which the note evidencing the contract may have taken does not affect his right to sue. For instance, in the case of Holmes v. Goldsmith,[102] a note was made for the accommodation of the payee, and discounted also for his accommodation, he indorsing it to the party who discounted it. In a suit by the holder of the note, it was held that the statute did not apply; that the holder could go against the payee as the party really liable, regardless of the fact that he was in form the indorser or payee, for the reason that, as it was accommodation paper, the payee could not have sued the makers; and therefore, as he had no right of action, there was nothing which he could assign, and hence that the holder of the note could sue, not by virtue of any assignment from him, but by virtue of an original liability of his own.

So, also, where a party gave a draft on a city and the city accepted the draft, in a suit by the payee of the draft against the city as acceptor, it was held that the suit was based upon an original liability of the city to the payee, and not upon any assigned right of action.[103]

Nor does the statute apply to a party claiming under the equitable doctrine of subrogation, as his right of action is an original one and not an assigned one, and this is not affected by the fact that an assignment may have been made merely to evidence the party's right to subrogation.[104]

[101] Barney v. Bank, Fed. Cas. No. 1,031.

[102] HOLMES v. GOLDSMITH, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

[103] City of Superior v. Ripley, 138 U. S. 93, 11 Sup. Ct. 288, 34 L. Ed. 914.

[104] City of New Orleans v. Gaines' Adm'r, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

Nor does the statute defeat the right of the assignee to sue in his own name where the original contract had been modified by a new contract, and the right of action properly arises under the new contract. This is illustrated by American Colortype Co. v. Continental Colortype Co.[105] In this case employés of a corporation had agreed, during their periods of employment, that they would not divulge the secret processes of their employer. The employer transferred these contracts to another company, and the employés agreed to the transfer. In a suit to restrain these employés from entering the employment of a rival corporation, it was held that under this transaction the company was asserting a right of action of its own, and not any assigned right of action from the first corporation.

The statute plainly refers only to an assignee of the right of action, and does not affect the defendant's side of the litigation. Hence, where the holder of a lease assigned it and the assignee took possession, a suit by the lessor against the assignee of the lessee, based on the lease, was held not covered by the statute.[106]

Nor does the statute apply to a party suing on a forthcoming bond in an attachment proceeding by virtue of a state statute which required the sheriff to take such a bond, such bond being for the benefit of parties injured by the attachment, for the right of action in such case is in the party injured, and not by virtue of any assignment from the sheriff.[107]

The statute imposes this restriction on the jurisdiction simply in reference to the original assignor and the last assignee. If jurisdiction can be obtained as far as they are concerned, the citizenship of intermediate assignees or indorsers does not defeat it.[108]

[105] 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404.
[106] Adams v. Shirk, 105 Fed. 659, 44 C. C. A. 653.
[107] Smith v. Packard, 98 Fed. 793, 39 C. C. A. 294.
[108] Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042.

It has been held that the statute imposes this restriction simply in so far as the citizenship of the party is concerned, not in reference to any other requisite of jurisdiction, and hence a party who held several assignments which together aggregated $2,000, and in which the assignors had the proper citizenship, was held to be entitled to sue, even though the other separate assignors could not have sued on account of the fact that the separate claims held by them were less than $2,000.[109] But the recent case of Waite v. City of Santa Cruz [110] is in conflict with this, though it discussed another section of the act.

The requisite as to the citizenship applies simply to the time of institution of suit, not to the time of assignment. If the proper citizenship exists as to the assignor and assignee when suit is brought, the fact that it did not exist when the assignment was made does not affect the question.[111]

In instituting such a suit, it is essential that the pleadings must show on their face the requisite citizenship both of the assignor and assignee.[112]

In considering the questions arising under this act, it is important to bear in mind that, while a somewhat similar requirement has been in the federal statutes since the original judiciary act of 1789, the language of the act of 1887–88 is very different. Hence decisions on cases arising prior to 1887–88 must be carefully compared with the acts then in force before they can be safely cited as bearing on the present act.

[109] Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248.

[110] 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552.

[111] Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042.

[112] Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; Smith v. Fifield, 91 Fed. 561, 33 C. C. A. 681.

CHAPTER XII.

THE CIRCUIT COURT (Continued)—ORIGINAL JURISDICTION (Continued).

107. Same—Devices to Confer Jurisdiction.
108. Same—Miscellaneous Jurisdiction.
109. Jurisdiction as Incident to Jurisdiction on the Grounds Previously Discussed.

SAME—DEVICES TO CONFER JURISDICTION.

107. Attempts to confer jurisdiction by pretended changes of citizenship or residence, or colorable assignments, are forbidden, and will cause dismissal of the suit by the court ex mero motu, if discovered.

The fifth section of the act of March 3, 1875, as amended by the act of August 13, 1888, provides as follows: "That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." [1]

This statute is intended to prevent attempts to confer upon the federal courts the jurisdiction not given them by law.

[1] 18 Stat. 472; 24 Stat. 555; 25 Stat. 436 [U. S. Comp. St. 1901, p. 511].

Changes of Citizenship.

It has sometimes happened that a citizen changes his citizenship for the purpose of acquiring a right to sue in the federal courts. If his change is an actual, bona fide change, and he removes and takes up his domicile in a new place, with the intention of remaining there, then the federal court would have jurisdiction, and the single fact that it was his intention to confer jurisdiction would not defeat it. This was held even before the enactment of the above statute, and has not been changed by the statute.[2]

Independently of this statute, a change of the citizenship of the litigant, in the federal courts, after the suit has been brought, does not defeat the jurisdiction; nor does the fact that new parties come into the litigation, as jurisdiction is tested by the state of facts at the institution of the suit, and not by subsequent changes.[3]

Transfer of Causes of Action.

This statute has come before the courts more frequently on such transfers than where attempts have been made to change the residence of litigants. The principle, however, in the two cases is the same. If the assignment of the cause of action is an actual, bona fide assignment, leaving no interest whatever in the assignor, then the court would have jurisdiction, subject, of course, to the restriction already discussed, as to the cases in which an assignee can sue; and that jurisdiction would not be defeated by the motive of the parties in making or accepting the assignment. But where the assignment is colorable—as for instance, where it is made simply for the purpose of collection—then the principle would apply, and the court would refuse jurisdiction. The cases of Williams v.

[2] Jones v. League, 18 How. 76, 15 L. Ed. 263; MORRIS v. GILMER, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690.

[3] Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888; Collins v. Ashland (D. C.) 112 Fed. 175.

Nottawa Tp.,[4] Farmington Village Corp. v. Pillsbury,[5] New Providence Tp. v. Halsey,[6] and Cashman v. Amador & S. Canal Co.[7] illustrate the refusal of the court to take jurisdiction where the assignment was for collection only. But here, too, if the assignment is an actual one, the motive does not affect the question.[8] On the other hand, if the transfer to one nonresident citizen is good, so that he could sue, the subsequent transfer by him to another, though with the intent of giving the other a right to sue, would not invalidate it.[9]

In the recent case of Waite v. City of Santa Cruz [10] the court held that the statute would apply not only if the assignment was colorable only, but if the amount was insufficient to have allowed the assignor to sue.

An interesting question arises in the case of organization of new corporations, as affecting this question. In the case of Lehigh Min. & Mfg. Co. v. Kelly [11] the stockholders of a Virginia corporation organized a Pennsylvania corporation, and conveyed to it the land, which up to that time had stood in the name of the Virginia corporation. The Virginia corporation, however, was still kept in existence, so that, although there was no express agreement by the Pennsylvania corporation to reconvey after the termination of the suit, it was in the power of the stockholders of the Virginia corporation to compel such reconveyance. The court held that, under such circumstances, the jurisdiction could not be sustained, as it was a mere device that came within the prohibition of the statute. On the other hand, in Irvine Co. v.

[4] 104 U. S. 209, 26 L. Ed. 719.

[5] 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114.

[6] 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904.

[7] 118 U. S. 58, 6 Sup. Ct. 926, 30 L. Ed. 72.

[8] Lanier v. Nash, 121 U. S. 404, 7 Sup. Ct. 919, 30 L. Ed. 947; Lake County Com'rs v. Schradsky, 97 Fed. 1, 38 C. C. A. 17.

[9] Ashley v. Supervisors, 83 Fed. 534, 27 C. C. A. 585.

[10] 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552.

[11] LEHIGH MIN. & MFG. CO. v. KELLY, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444.

Bond [12] an individual organized a corporation, appointed as a board of directors parties whom he could control, and conveyed to them just enough stock to qualify them, and then conveyed to this new corporation the property as to which suit was to be brought. There was nothing to show any intent to convey the fruits of litigation back to the individual, though he controlled all but a few shares of the corporate stock, and practically controlled the board of directors. The court held in this case that the transfer gave jurisdiction to the new corporation to sue, despite the above Supreme Court decision.

Colorable Assertion of Federal Question.

The statute also applies where a federal question has been evidently raised for the mere purpose of conferring jurisdiction on the court—especially when, after the pleadings are made up, it is patent that the federal question is immaterial, and that the case will turn upon other questions.[13]

The statute may also be violated by an improper joinder of parties for the express purpose of conferring jurisdiction. For instance, a suit by a stockholder against a corporation and the officers of the corporation, who refuse to assert a corporate right—the officers being joined merely on the allegation that they had been requested to assert the right and had refused—contravenes the statute.[14]

In equity cases this is also covered by equity rule 94, which provides as follows: "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder

[12] (C. C.) 74 Fed. 849.

[13] Robinson v. Anderson, 121 U. S. 522, 7 Sup. Ct. 1011, 30 L. Ed. 1021; Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; ante, c. 10.

[14] City of Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300.

at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action."

However, the mere fact that the trustees are in sympathy with the action brought by the stockholder would not defeat the jurisdiction, nor bring them within the purview of this rule, if their refusal to bring suit in the name of the corporation was actually bona fide, and based on grounds which they thought sufficient.[15]

Method of Attacking Jurisdiction under This Section.

Under the express language of the act, lack of jurisdiction need not be raised by the pleadings, though it would be proper to do so. It may be raised at any time, and the court, of its own motion, may raise it.[16] The statute, however, requires that the want of jurisdiction on this ground must "appear to the satisfaction of said court." Under this clause the court discourages attempts to raise the question when it has not been raised by the pleadings, and the case has progressed far on the merits. In such case the party raising it has the burden of proof to show clearly that the statute has been violated.[17]

[15] Bowdoin College v. Merritt (C. C.) 63 Fed. 213. See, also, on this general subject, Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; City of Quincy v. Steel, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624; Simpson v. Stockyards Co. (C. C.) 110 Fed. 799.

[16] MORRIS v. GILMER, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Lake Co. v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684.

[17] Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; Collins v. Ashland (D. C.) 112 Fed. 175; Kilgore v. Norman (C. C.) 119 Fed. 1006.

SAME—MISCELLANEOUS JURISDICTION.

108. The original civil jurisdiction of the circuit courts extends to the following miscellaneous matters:

(a) Suits in equity by the United States.
(b) Suits at common law by United States or officers.
(c) Imports, internal revenue, and postal suits.
(d) Certain suits for penalties.
(e) Condemnation of insurrectionary property.
(f) Suits under slave-trade laws.
(g) Suits on certain debentures.
(h) Patent and copyright suits.
(i) Suits against national banks.
(j) Certain suits against the Comptroller of the Currency.
(k) Suits to recover damages for violation of certain federal rights.
(l) Suits to recover offices.
(m) Suits for removal of officers holding contrary to fourteenth amendment.
(n) Penalties under laws relating to elective franchise.
(o) Certain civil rights suits.
(p) Suits on account of injuries by conspirators in certain cases.
(q) Suits against persons having knowledge of such conspiracy.
(r) Suits against officers and owners of vessels for negligence causing death.
(s) Suits against the United States.
(t) Suits to abate unlawful inclosures of public lands.
(u) Suits under interstate commerce act.
(v) Condemnation proceedings.
(w) Habeas corpus.
(x) Writs of ne exeat.
(xx) Suits under anti-trust acts.
(y) Obstructions to navigation.
(yy) Certain bankruptcy matters.
(z) Suits on bonds of contractors for paper for public printing.
(zz) Review of decisions of appraisers.

(a) Suits in Equity by the United States.

The second clause of section 629 of the Revised Statutes gives the circuit courts original jurisdiction "of all suits in

equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners."

It has been seen, under the discussion of the acts of March 3, 1875, and the subsequent amendatory acts, that they also give jurisdiction where the United States are plaintiffs or petitioners, and in that discussion it has been seen that the courts have jurisdiction of such controversies independent of the amount involved.[18]

(*b*) *Suits at Common Law by United States or Officers.*

The third clause of section 629 gives the circuit court jurisdiction "of all suits at common law, where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs."

In this respect the district courts have concurrent jurisdiction, and reference is made to the discussion there.[19]

(*c*) *Suits under Import, Internal Revenue, and Postal Laws.*

The fourth clause of section 629 gives the circuit court original jurisdiction "of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws."

As to suits to enforce the lien of the United States upon real estate for internal revenue taxes, and causes of action arising under the postal laws, the district courts have concurrent jurisdiction.[20]

Under this clause the circuit courts have jurisdiction of proceedings in rem for forfeitures in violation of the internal

[18] Ante, c. 10, p. 202.

[19] Rev. St. § 563, cl. 4 [U. S. Comp. St. 1901, p. 456]; ante, c. 4.

[20] Rev. St. § 563, cls. 5–7 [U. S. Comp. St. 1901, p. 456]; ante, c. 4.

revenue laws;[21] also of actions against a collector of customs for duties illegally exacted.*

(d) Certain Suits for Penalties.

The fifth clause of section 629 gives the circuit court jurisdiction "of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels."

Title 52 of the Revised Statutes, covering sections 4463 to 4500, and various acts amendatory thereof,[22] prescribe regulations for the protection of passengers on merchant vessels, and the circuit courts have jurisdiction to enforce the penalties therein prescribed. The district courts also would have jurisdiction to enforce such penalties.[23]

There are various federal statutes which also give jurisdiction to the circuit court for the enforcement of penalties. For instance, the alien contract labor law, of February 26, 1885, and the subsequent amendments,[24] gave both the district and the circuit court jurisdiction to enforce the penalties thereby incurred.[25] At the same time the district court is primarily intended as the court for the enforcement of penalties, and the circuit court has not jurisdiction, unless under the clear provision of some statute. For instance, it has been held that the act of March 3, 1875, as amended by the subsequent acts, which gives the circuit court civil jurisdiction not only on the ground of citizenship, but on the ground that the question arises under the Constitution or laws of the United States, is not of itself sufficient to confer jurisdiction upon it for the enforcement of penalties, as it was intended to provide simply for its civil jurisdiction; and penalties, in that respect, at least, are criminal, rather than civil, in their

[21] Coffey v. U. S., 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681.

* Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

[22] U. S. Comp. St. 1901, p. 3044.

[23] Section 563, cl. 8 [U. S. Comp. St. 1901, p. 456].

[24] U. S. Comp. St. 1901, p. 1290.

[25] LEES v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

nature. Unless this were true, the other requirements of jurisdiction named in that act—as, for instance, the requirement of $2,000 as a limit in amount, would deprive the circuit courts of a large amount of jurisdiction.[26]

(*e*) *Condemnation of Insurrectionary Property as Prize.*

The sixth clause of section 629 gives the circuit court original jurisdiction "of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title 'Insurrection.'"

(*f*) *Suits under Slave-Trade Laws.*

The seventh clause of section 629 gives the circuit court original jurisdiction "of all suits arising under any law relating to the slave-trade."

(*g*) *Suits on Debentures.*

The eighth clause of section 629 gives the circuit court original jurisdiction "of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture."

The district court has concurrent jurisdiction of this class of suits.[27]

(*h*) *Patent and Copyright Suits.*

The ninth clause of section 629 gives the circuit court original jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States."

This very extensive ground of federal jurisprudence cannot be discussed in the limits prescribed by this treatise, and must be left to books dealing specially with that subject.

It is, however, important to bear in mind that the mere fact that a patent may be incidentally connected with the litigation is not of itself sufficient to confer jurisdiction under

[26] U. S. v. MOONEY, 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550.

[27] Rev. St. § 563, cl. 10 [U. S. Comp. St. 1901, p. 458]; ante, p. 69.

this clause. The right of the party must depend directly upon the patent or copyright law itself, and must not be merely incidentally involved. There is a large class of cases which settle that it does not cover mere suits on contracts connected with a patent, like questions of construction, or questions involving the validity of a license to use a patent.[28]

A suit to enjoin the assessment of taxes on the ground that they are levied on patent rights is not a suit arising under the patent or copyright laws of the United States, in the sense of this statute.[29] On the other hand, an action for damages for the infringement of a copyright, under the provisions of section 4966 of the Revised Statutes, does arise under the patent or copyright laws of the United States,[30] as also a suit to recover the penalty of one dollar for each copy of the copyrighted article circulated contrary to the provisions of section 4965 of the Revised Statutes.[31]

(*i*) *Suits against National Banks.*

The tenth clause of section 629 gives the circuit court original jurisdiction "of all suits by or against any banking association, established in the district for which the court is held, under any law providing for national banking institutions."

There is a corresponding provision in clause 15, § 563, prescribing the jurisdiction of the district courts, and the effect of the later acts upon that section is discussed in that connection, and is equally applicable here.[32]

(*j*) *Suits to Enjoin the Comptroller of the Currency.*

The eleventh clause of section 629 gives the circuit court original jurisdiction "of all suits brought by any banking as-

[28] Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

[29] Holt v. Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374.

†U. S. Comp. St. 1901, p. 3415.

[30] Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109.

[31] Falk v. Publishing Co. (C. C.) 100 Fed. 77.

[32] Ante, pp. 20, 21.

sociation established in the district for which the court is held, under the provisions of title 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title."

The act for which an injunction may issue under this clause is prescribed in section 5237 ‡ of the Revised Statutes, and is intended to give a national bank an opportunity to contest the charge that it has refused to redeem its circulating notes. The subsequent statutes regulating the jurisdiction in suits by or against national banks hardly seem to operate as a repeal of this provision, as it is a question arising, not so much from the citizenship or location of the bank, as from the character of the charge.

(*k*) *Suits for Injuries on Account of Acts Done under Laws of the United States.*

The twelfth clause of section 629 gives the circuit court original jurisdiction "of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states."

This is clearly intended to insure a trial of questions of this sort in the federal courts. Independent of this clause, the federal courts would have jurisdiction of such a suit on the ground that it involved a federal question, but in that case the other jurisdictional requirements, as to amount, etc., would also have to concur, whereas under this clause the amount would be immaterial.

(*l*) *Suits to Recover Offices.*

The thirteenth clause of section 629 also gives the circuit court original jurisdiction "of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or mem-

‡U. S. Comp. St. 1901, p. 3508.

ber of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the states."

The thirteenth clause of section 563 gave concurrent jurisdiction to the district courts of suits of this character, but as the right to sue at all depended upon section 2010 of the Revised Statutes, and that section has been repealed by the act of February 8, 1894,[83] this clause falls with it.

(m) Suits for Removal of Officers Holding Contrary to Fourteenth Amendment.

The fourteenth clause of section 629 gives the circuit court original jurisdiction "of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a state Legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States."

This amendment to the Constitution disqualified from holding office any person who, having, under certain circumstances, taken an oath to support the Constitution of the United States, afterwards took part on the side of the South in the Civil War. But as the act of January 6, 1898,[84] gave a general amnesty in all such cases, this clause is obsolete.

The fourteenth clause of section 563 gave the district courts concurrent jurisdiction in such cases.

[83] 28 Stat. 36, c. 25 [U. S. Comp. St. 1901, p. 1272 et seq.].
[84] 30 Stat. 432, c. 389 [U. S. Comp. St. 1901, p. 1202].

(*n*) *Suits for Penalties under Laws to Enforce Elective Franchise.*

The fifteenth clause of section 629 gives the circuit court original jurisdiction "of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several states."

These forfeitures were prescribed by sections 2006, 2008, and 2009 of the Revised Statutes, but they have been repealed by the act of February 8, 1894. This clause is therefore obsolete.[35]

(*o*) *Suits to Redress the Deprivation of Federal Rights.*

The sixteenth clause of section 629 gives the circuit court original jurisdiction "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." [36]

In this respect the district courts have concurrent jurisdiction under clause 12 of section 563. Some of the provisions of the civil rights act of March 1, 1875,[37] have been held unconstitutional.**

The above clause does not apply to a suit to enjoin a tax assessment because it is made upon a patent right, as has been seen in another connection.[38]

[35] 28 Stat. 36, c. 25 [U. S. Comp. St. 1901, p. 1272 et seq.].

[36] Holt v. Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374.

[37] 18 Stat. 335, c. 114 [U. S. Comp. St. 1901, p. 1259].

**Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835.

[38] Holt v. Manufacturing Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374.

(*p*) *Suits on Account of Injuries by Conspirators in Certain Cases.*

The seventeenth clause of section 629 gives the circuit court original jurisdiction "of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, title, 'Civil Rights.'"

The eleventh clause of section 563 gave the district courts concurrent jurisdiction of these matters.

(*q*) *Suits against Persons Having Knowledge of Such Conspiracy.*

The eighteenth clause of section 629 gives the circuit court jurisdiction "of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act."

These suits are authorized by section 1981 of the Revised Statutes.[39]

(*r*) *Suits against Officers and Owners of Vessels for Negligence Causing Death.*

The nineteenth clause of section 629 gives the circuit court original jurisdiction "of all suits and proceedings arising under section fifty-three hundred and forty-four, title 'Crimes,' for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed."

Section 5344, alluded to,[40] makes the owners and officers of steamboats guilty of manslaughter in certain cases.

[39] U. S. Comp. St. 1901, p. 1263.
[40] U. S. Comp. St. 1901, p. 3629.

(*s*) *Suits against the United States.*

The Tucker act of March 3, 1887,[41] gives the right to sue the United States in the district of the plaintiff's residence for certain causes of action arising out of contract. If the cause of action is under one thousand dollars, the district court has jurisdiction, and if it is over one thousand dollars, and does not exceed ten thousand dollars, the circuit court has jurisdiction, and both courts in such cases have concurrent jurisdiction with the court of claims.

The circumstances under which suit can be brought by virtue of this statute, and the proceedings thereunder, have been discussed in connection with the jurisdiction of the district courts.[42] Those causes of action sound in money, and do not authorize indiscriminate suits against the United States. There is, however, a special act authorizing a suit for partition of lands of which the United States is one of the tenants in common or joint tenants. This is the act of May 17, 1898.[43] Its first section provides "that the several circuit courts of the United States shall have jurisdiction of suits in equity, brought by any tenant in common, or joint tenant, for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suit to be brought in the circuit court of the district in which such land is situated."

Its second section provides for service of notice on the United States by causing a copy of the bill to be served upon the local district attorney, and by mailing a copy by registered letter to the Attorney General of the United States. It then becomes the duty of the local district attorney to appear within sixty days after such service, unless the time is extended, and defend. And it authorizes the Attorney Gen-

[41] U. S. Comp. St. 1901, p. 752.

[42] Ante, p. 161. See, also, U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. 327, 37 L. Ed. 164; U. S. v. Morgan, 99 Fed. 570, 39 C. C. A. 653.

[43] 30 Stat. 416, c. 339 [U. S. Comp. St. 1901, p. 516].

eral, in his discretion, to bid for the property in case a sale for partition is ordered.

(*t*) *Suits to Abate Unlawful Inclosures of Public Lands.*

The act of February 25, 1885,[44] confers upon the circuit court jurisdiction for this purpose. The district courts have concurrent jurisdiction in such cases, and reference is made to the discussion of the question in that connection.[45]

(*u*) *Suits under Interstate Commerce Act.*

The tenth section of the interstate commerce act, with the subsequent amendments, gives jurisdiction to both the district and the circuit courts of certain suits for its violation, including the right to mandamus in certain cases provided.[46]

(*v*) *Condemnation Proceedings.*

The circuit courts have concurrent jurisdiction with the district courts in these matters, as has been seen in discussing the question in connection with the jurisdiction of the district courts.[47]

(*w*) *Habeas Corpus.*

Under section 751 et seq. of the Revised Statutes, the circuit courts have jurisdiction concurrent with the district courts of habeas corpus proceedings. Reference is made to the discussion of the subject in connection with the jurisdiction of the district courts.[48]

(*x*) *Writs of Ne Exeat.*

Under section 717 of the Revised Statutes,[49] it is provided: "Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit court justice or circuit

[44] 23 Stat. 321, c. 149 [U. S. Comp. St. 1901, p. 1524].

[45] Ante, p. 169.

[46] 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]; 25 Stat. 855 [U. S. Comp. St. 1901, p. 3172].

[47] Ante, p. 171.

[48] Ante, p. 174.

[49] U. S. Comp. St. 1901, p. 580.

judge, in cases where they might be granted by the court of which he is a judge. But no writ of ne exeat shall be granted, unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

It has been held that the jurisdiction of the circuit court is not exclusive of the district court, but, under section 716, giving the Supreme Court, circuit courts, and district courts power to issue writs necessary for the exercise of their respective jurisdictions, the district court may also issue it in connection with a case in that court.

Nor is the right to issue it limited to the progress of the case before final decree, but it may be issued after final decree, as a means of preventing a debtor from concealing his property and absconding.[50]

This writ, however, is not a matter of right, and the court, in its discretion, may refuse to issue it if the inconvenience to the defendant is great, and the plaintiff has equally convenient methods of protecting himself. For instance, where a citizen of New York applied to a United States court in Maine to issue it against a Canadian, who was merely there on a vacation, and who was easily suable in Quebec, in such case the judge refused to issue it.[51]

The usual condition of the bond taken from the defendant seized under this writ is that he will be amenable to the further orders and processes of the court issuing it, though it would not be improper to make the bond conditioned that he should perform the decree of the court.[52]

(xx) Suits under the Anti-Trust Acts.

Procedures for violation of these acts [53] may be taken in the circuit courts, and there have been a number of them. As

[50] Shainwald v. Lewis (D. C.) 46 Fed. 839.

[51] Harrison v. Graham (C. C.) 110 Fed. 896.

[52] Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678.

[53] Act July 2, 1890, c. 647, § 4, 26 Stat. 209 [U. S. Comp. St. 1901,

they are based upon the power of Congress to regulate interstate commerce, it was first decided that they did not apply to trusts to regulate a mere local product, which has not become the subject of commerce between the states.[54]

The act does apply to agreements regulating rates, and to a pooling agreement between different common carriers engaged in interstate commerce.[55] It applies only to agreements directly connected with interstate commerce, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and the instrumentalities by which such commerce is conducted.[56]

It applies to an agreement between private corporations engaged in different states in the manufacture and marketing among the different states of iron pipe.[57]

It applies to an agreement between manufacturers and dealers in tile grates and mantels in the different states, and controlling the price of products in those states.[58]

It applies to the organization of a holding corporation which bought up a controlling interest in two competing lines of transportation for the purpose of preventing competition between them.[59]

p. 3201]; Act Aug. 27, 1894, c. 349, § 73, 28 Stat. 570 [U. S. Comp. St. 1901, p. 3202].

[54] U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.

[55] U. S. v. Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Association, 171 U. S. 505, 569, 571, 19 Sup. Ct. 25, 43 L. Ed. 259.

[56] Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300.

[57] Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

[58] Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

[59] NORTHERN SECURITIES CO. v. U. S. (C. C.) 120 Fed. 721; ID., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

(y) *Suits to Remedy or Prevent Obstructions to Navigation.*

The act of March 3, 1899, forbidding obstructions to navigation,[60] gave jurisdiction to the circuit courts to enforce the removal by injunction against any structures erected in violation of the provisions of this act. This provision was about the same as the corresponding provision of the previous act of September 19, 1890, and this section only authorized suits by the United States under the limitations therein prescribed. Under these acts there have been many cases reported in the books in which relief of this sort has been given by the courts. For instance, where a railroad embankment, though not directly on a navigable river, caused a rise of part of the bed of the river, due to the pressure of a substratum from extra weight of the fill, and this resulted in an interference with the navigation, a suit in the name of the United States to enjoin the continuance of the obstruction was entertained.[61]

So a suit to prevent the diversion of water from a stream to such an extent as to substantially diminish its navigation is sustainable by the United States.[62]

Independent of the special remedy given by this section, however, suits will lie on behalf of private parties if they can show special injury arising from an obstruction for which defendants are made liable by this and similar acts, as such suits would involve a federal question.[63]

In Harrison v. Hughes [64] a libel in personam was sustained by the owners of a steamer for injuries caused by her running against an unlighted breakwater which was being constructed

[60] 30 Stat. 1151, c. 425 [U. S. Comp. St. 1901, p. 3540].

[61] Northern Pac. Ry. Co. v. U. S., 104 Fed. 691, 44 C. C. A. 135, 59 L. R. A. 80.

[62] U. S. v. Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

[63] Nester v. Match Co., 105 Fed. 567, 44 C. C. A. 606, 52 L. R. A. 950; E. A. Chatfield Co. v. New Haven (C. C.) 110 Fed. 788.

[64] (D. C.) 110 Fed. 545; Id., 125 Fed. 860, 60 C. C. A. 442.

by the defendants as government contractors. This suit arose before the above act.

(yy) *Bankruptcy Suits.*

Section 630 of the Revised Statutes provides: "The circuit courts shall have jurisdiction in matters in bankruptcy, to be exercised within the limits and in the manner provided by law."

Section 23 of the bankruptcy act of July 1, 1898,[65] as amended by the act of February 5, 1903, § 8,[66] provides as follows:

"(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the trustee, shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision 'b,' and section sixty-seven, subdivision 'e.'

"(c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

But while the circuit courts have jurisdiction of questions growing out of the bankruptcy act when they are federal questions, and also under the above-quoted act, it must be remembered that they are not courts of bankruptcy, in the sense

[65] U. S. Comp. St. 1901, p. 3431.
[66] U. S. Comp. St. Supp. 1903, p. 413.

that they have no powers of administration like the powers vested in those courts.

(*z*) *Suits on Bonds of Contractors for Paper for Public Printing.*

Section 10 of the act of January 12, 1895,[67] gives jurisdiction against a defaulting contractor and his sureties, in certain cases arising under this act, to the circuit courts.

(*zz*) *Review of Decisions of Appraisers.*

Section 15 of the act of June 10, 1890,[68] gives the circuit courts jurisdiction to review decisions of boards of appraisers as to certain questions of duties, and provides for eventually taking the question to the Supreme Court itself under certain circumstances.

JURISDICTION AS INCIDENT TO JURISDICTION ON THE GROUNDS PREVIOUSLY DISCUSSED.

109. The federal courts have jurisdiction in a large class of matters on the ground that the same is a mere incident or sequel to jurisdiction already acquired under some of the preceding heads, although they would not have jurisdiction of such matters as an original proposition. In other words, in these ancillary or incidental proceedings the question of citizenship or amount involved is immaterial, and the jurisdiction is conferred by reason of the principle that it is necessary as an incident to the main case, and in order to carry out the objects of the main case and give complete relief, or to settle all questions necessarily dependent upon the main case.[69]

[67] 28 Stat. 602, c. 23 [U. S. Comp. St. 1901, p. 2536 et seq.].

[68] U. S. Comp. St. 1901, p. 1933.

[69] Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397; Id., 167 U. S. 1, 17 Sup. Ct. 795, 42 L. Ed. 55 (the questions discussed in the Supreme Court opinion are not in point on this special question); WHITE v. EWING, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; People's Sav. Inst. v. Miles, 76 Fed. 252, 22 C. C. A. 152; Peck v. Elliott, 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616; Hill v. Kuhlman, 87 Fed. 498, 31 C. C. A. 87.

A common branch of this ancillary jurisdiction is those cases where some additional suit is brought or proceeding instituted to carry out the object of the main litigation, or to realize its fruits. For instance, in Stewart v. Dunham,[70] which was a creditors' bill to set aside an alleged fraudulent conveyance, it was held that the admission of additional creditors as co-complainants did not defeat the jurisdiction, but that the court had power to consider their claims independent of their citizenship or the amount involved.

In Gumbel v. Pitkin,[71] attachments had issued from a United States court, and property had been seized thereunder. Then a creditor in a state court issued an attachment, and placed it in the hands of the sheriff, and had notice of this attachment served upon the marshal, but without any seizure, as that could not have been accomplished. He then asked leave to intervene in the federal court case, and he was allowed to do so, though he was not a party at all to the first litigation, on the ground that his proceeding was a dependent bill; that he was obliged to come into the federal court, because he could really go nowhere else; and that the court having jurisdiction of the main case had jurisdiction to pass upon all questions incidentally involved. From this it appears that a bill may be ancillary or dependent even though the parties may be different from the parties in the first suit.

In Root v. Woolworth [72] a decree had been entered settling the title to land, and a conveyance by a commissioner of court had been made in pursuance of that decree. The defendant in the first case disregarded the decree, and still asserted title to the land. It was held that a bill would lie by an assignee of the first plaintiff to enjoin the defendant from such assertion of title, and that such bill was supplementary and ancillary.

[70] 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

[71] 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374.

[72] ROOT v. WOOLWORTH, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123.

In White v. Ewing [73] the assets of a corporation were being administered by a court. The receiver brought a number of claims against different debtors to the corporation all in one proceeding, many of whom owed less than two thousand dollars. There was no demurrer as to the joinder of all of these defendants in one proceeding. It was held that the court had jurisdiction of these proceedings, as ancillary to the main suit, whether or not it had jurisdiction of them as independent proceedings.

In New Orleans v. Fisher [74] a judgment creditor of New Orleans filed a bill against the school board of that city to force an accounting of the collections of school taxes. Jurisdiction was sustained as ancillary to the enforcement of the main judgment which had been obtained in the United States court, though the school board was not a party to the first litigation.

In Phelps v. Mutual Reserve Fund Life Association [75] there was a proceeding in a state court against a nonresident insurance company, against whom judgment had been obtained, which looked to the appointment of a receiver and impounding premiums due it. This suit was removed into the federal court, where it was held that it was ancillary to the main suit, and sustainable on that ground.

Under this principle the court, having obtained jurisdiction in the main cause, has the right to consider any incidental questions arising thereunder, or brought to its attention by petition or otherwise, which are naturally connected with the main litigation, as in this way complete and speedy justice can best be done.

In Blake v. Pine Mountain Iron & Coal Company [76] it was

[73] WHITE v. EWING, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67.

[74] 180 U. S. 185, 21 Sup. Ct. 347, 45 L. Ed. 485.

[75] 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

[76] 76 Fed. 624, 22 C. C. A. 430.

decided that, when property was in charge of a receiver of a federal court, it could consider the claims of all parties thereby affected or interested in the property, regardless of the grounds of jurisdiction in the main case, as this was necessarily incidental to the main case.

In Central Trust Co. v. Benedict [77] a trust company held a certain fund as custodian. In a foreclosure receivership suit it was held that the court could consider the petition of the trustee for compensation out of that fund as an incident to the main cause.

In Central Trust Co. v. Bridges [78] a suit for foreclosure was pending. The court permitted parties who claimed mechanics' liens to come in by petition, and decided that it had the right to consider their claims as ancillary to the main litigation.

In Jenks v. Brewster [79] a suit to construe and enforce a decree of a federal court was held to be ancillary to the main suit.

Under this principle the court may protect property under its control from proceedings by adverse claimants. It has been seen from the above cases that such adverse claimants have the right to come into the federal court for relief. The court, however, could not only give them the right to intervene, but can compel them to do so if they attempt in any way to interfere with the property under its control, and this applies to a claim for taxes by a state against the property.[80]

The court, under this principle, can take jurisdiction of a suit on an attachment bond given in the main proceeding. Independent of this principle of ancillary process, such a suit would naturally involve a federal question; but, if this prin-

[77] 78 Fed. 198, 24 C. C. A. 56.

[78] 57 Fed. 753, 6 C. C. A. 539.

[79] (C. C.) 96 Fed. 625.

[80] Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176; Ex parte Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689.

ciple alone could be applied to sustain jurisdiction, then the amount involved would have to be two thousand dollars. If, however, such proceedings are sustainable on the ground that they are ancillary, these other requisites of jurisdiction which apply to the main suit do not apply.[81]

One of the most common and useful grounds of ancillary jurisdiction in the federal courts is the case where property which extends into more than one district, or even into more than one state, comes into the possession of the federal court for purposes of administration. The best known instances of these proceedings are those of railroads whose lines run through different states or districts. A great advantage of the federal courts, which has led to these suits being in a great majority of cases brought there, is this very fact—that, when one federal court takes jurisdiction of such a proceeding, ancillary proceedings can be filed in every other district or state where the defendant may have property. In such case one district is treated as the main district. The orders and various steps in the proceeding are taken in that district, and the judges in the other districts do little more than merely register the decrees of the first district. It is a well-settled practice in such case that the claims against the defendant should be asserted in the main case, and not in the ancillary district.[82]

It is largely a question of convenience which should be selected as the main district in the first instance. As a rule the best district to select is the district of the defendant's principal office; but where suit is first brought in another district, and the defendant company has appeared, or legal service has been obtained upon it, that may be treated as the main district.[83]

[81] Files v. Davis (C. C.) 118 Fed. 465.

[82] Central Trust Co. v. Railroad Co. (C. C.) 80 Fed. 895; Central Trust Co. v. Milling Co. (C. C.) 112 Fed. 371.

[83] Farmers' Loan & Trust Co. v. Railroad Co. (C. C.) 72 Fed. 26.

Mandamus Proceedings.

The writ of mandamus in the federal courts is not an original proceeding at law or in equity, and therefore the courts have no jurisdiction in proceedings of that nature as original proceedings.[84]

In these courts mandamus is a dependent or ancillary proceeding, and can be used only in that way, and when the court has already acquired jurisdiction in the main case on some well-established ground of federal jurisdiction. But its use in this way in the nature of a writ of execution, or a writ to effectuate the relief granted in the main suit, is quite common. For instance, in Labette County Com'rs v. U. S.,[85] where judgment had been obtained in a federal court against a township, a mandamus proceeding against the officers charged with the duty of satisfying such judgment was sustained, to enforce the judgment, on the ground that it was such an ancillary proceeding, though the parties defendant to the writ were not parties to the original suit.

In Hair v. Burnell [86] the judgment had been obtained in a federal court against a stockholder of a corporation, and his stock had been garnished through the corporation, and sold under execution. The court sustained a mandamus by the purchaser of the stock against the corporation to compel its transfer on the books to the purchaser.

In Board of Liquidation of City of New Orleans v. U. S.[87] a proceeding by mandamus against the board of liquidation to enforce a federal judgment against the city was sustained, though the board itself, as a corporation, was not a party to the original suit.

In this important suit the judges of the different circuits met at a common point, conferred together, and agreed upon a uniform decree.

[84] ROSENBAUM v. BAUER, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743; Indiana v. Railway Co. (C. C.) 85 Fed. 1.

[85] 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698.

[86] (C. C.) 106 Fed. 280.

[87] 108 Fed. 689, 47 C. C. A. 587.

Scire Facias.

The federal courts have jurisdiction of a scire facias not only by virtue of section 716, but also because this, too, is considered an ancillary or dependent proceeding. For instance, in Pullman's Palace Car Co. v. Washburn [88] such a proceeding was sustained, which was instituted to enforce liability for costs obtained on a judgment in the federal court.

So, too, in Lafayette Co. v. Wonderly [89] a scire facias to revive a personal judgment of the federal courts was sustained as an ancillary proceeding.

A common class of ancillary proceedings is those instituted for the purpose of seeking protection against the original suit on grounds which could not have been raised in such suit. The best-known class of this jurisdiction is bills to enjoin judgments obtained in federal courts. The only remedy against such judgments is in the federal courts, and hence such bills are sustainable, and are considered ancillary.[90]

The same principle applies to bills to enjoin suits which have not proceeded to judgment. The federal courts have jurisdiction of such proceedings—in fact, they are the only courts which would have such jurisdiction, as state courts cannot enjoin proceedings in federal courts. For instance, in Bradshaw v. Miners' Bank [91] a bill to enjoin the prosecution of a creditors' suit was held ancillary to the main suit, and sustainable on that ground.

In Virginia-Carolina Chemical Co. v. Home Ins. Co.[92] the insured had brought separate actions against many insurance companies, who had separate policies which provided that the companies should be liable only for their proportionate

[88] (C. C.) 66 Fed. 790; Washburn v. Car Co., 76 Fed. 1005, 21 C. C. A. 598.

[89] 92 Fed. 313, 34 C. C. A. 360.

[90] JOHNSON v. CHRISTIAN, 125 U. S. 642, 8 Sup. Ct. 989, 31 L. Ed. 820; Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935.

[91] 81 Fed. 902, 26 C. C. A. 673.

[92] 113 Fed. 1, 51 C. C. A. 21.

share of the loss. It was held that a bill to adjust the equities of the insurance companies as among themselves and against the insured, and to enjoin the prosecution of the common-law suits, would lie as ancillary to the main suit.

The same principle applies to suits to set aside decrees or to construe them.[93]

In the case of Minnesota Co. v. St. Paul Co.[94] the court, in defining these ancillary suits, is careful to call attention to the fact that they may be ancillary in the federal courts, even though, under the common-law rules of federal procedure, they would be treated as original. It says: "But we think that the question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill, in the chancery sense of the word. Yet this court has decided many times that, when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law—so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into

[93] Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. Ed. 886; Pacific R. Co. v. Railroad Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498.

[94] 2 Wall. 609, 17 L. Ed. 886.

effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court, and subject to its order."

Cross-Bills.

Another common procedure sustainable under this principle of ancillary jurisdiction is the case of cross-bills, which are treated as ancillary, and therefore within the jurisdiction of the court, when they relate to the same subject-matter as the original or main litigation.[95]

Under the inherent power of the court to prevent its process from being used, either fraudulently or otherwise, in such manner as to cause oppression, or to deprive any one of his rights, proceedings to settle adverse claims to property, either by asserting title or by questioning the proceedings in the main case, are sustainable as ancillary and dependent.

In Krippendorf v. Hyde[96] the marshal had attached the property of a third party as belonging to the defendant. This third party was allowed to intervene for the purpose of securing relief, and this proceeding was treated as ancillary, and justified by the inherent power of the court to prevent its process from being oppressively used.

[95] Morgan's L. & T. R. & S. S. Co. v. Railroad Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Everett v. School Dist. (C. C.) 102 Fed. 529; Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201.

[96] 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Broadis v. Broadis (C. C.) 86 Fed. 951.

CHAPTER XIII.

THE CIRCUIT COURT (Continued)—JURISDICTION BY REMOVAL.

110. Removals from the United States District Courts.
111. Removals from State Courts—Purpose of Such Jurisdiction.
112. Nature of the Right—How Far Waivable.
113. Scope of the Jurisdiction.
114. Federal Questions.
115. Suits by the United States.

The class of jurisdiction of the circuit courts by removal from other courts is practically as extensive as its jurisdiction over cases originally instituted there. It acquires jurisdiction in this way by transfer or removal, first, from the district courts; and, second, from the state courts.

REMOVALS FROM THE UNITED STATES DISTRICT COURTS.

110. The circuit court has jurisdiction by removal from the United States district court in certain instances where, for various prescribed reasons, it is impossible or improper for the district judge to try the case.

Section 637 of the Revised Statutes [1] provides: "When any cause, civil or criminal, of whatever nature, is removed into a circuit court, as provided by law, from a district court wherein the same is cognizable, on account of the disability of the judge of such district court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party to such cause as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner,

[1] U. S. Comp. St. 1901, p. 519.

as the said district court might have, or as said circuit court might have if the same had been originally and lawfully commenced therein; and shall proceed to hear and determine the same accordingly."

It has been seen in previous connections that, under section 587 of the Revised Statutes,[2] certain cases can be transferred from the district courts to the circuit courts where the district judge, for various reasons therein specified, cannot try the case. This section gives the circuit courts power under such circumstances to take jurisdiction and dispose of it.

REMOVALS FROM STATE COURTS—PURPOSE OF SUCH JURISDICTION.

111. The purpose of the federal jurisdiction by removal from state courts in certain cases, principally of diverse citizenship and federal questions, is that in the former local influence and prejudice may be avoided, and in the latter the right to have the federal courts pass upon such questions is essential to the proper administration of federal laws.[3]

In discussing the original jurisdiction, it has been seen that these cases may originally be brought in the federal court. Where the parties asserting a federal right or residing outside of a state are plaintiffs, this provision is sufficient for their protection; but it was necessary to provide, also, for those cases where the nonresident was a defendant, or where the federal question asserted in a state court could be removed by the party against whom it was asserted. Hence the provision allowing the removal of cases from state courts into the federal courts. The constitutional right of Congress to provide not only for giving the federal courts original cognizance of such cases, but also for giving the right of removal, is well settled.[4]

[2] U. S. Comp. St. 1901, p. 479.

[3] Federalist, No. 80.

[4] Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

The provisions for removal of cases, however, elaborate as they are, fall far short of the constitutional grant to Congress of legislation on this subject. There are many cases involving federal questions, or involving controversies between citizens of different states, which cannot be removed into the federal courts. It is true, as will be seen hereafter, that in some of these cases an appeal can be taken from the state court of last resort to the Supreme Court of the United States, where a federal question is involved, but even this does not by any means exhaust the possibilities of such cases. Where a right arising under the Constitution and laws of the United States is asserted in a state court, and decided in favor of the right in the state court, such appeals do not lie, and there are many questions where the construction of the Constitution or an act of Congress may be involved in a state court over which no federal court has any supervision. The legislation of Congress on this point therefore has been conservative and temperate.

NATURE OF THE RIGHT—HOW FAR WAIVABLE.

112. This right to remove cases is purely statutory, and, as in similar cases of original suits, cannot be conferred by consent, but the parties must make a clear showing of compliance with the statute and of the jurisdictional facts.[5]

But while consent cannot give this right, consent can waive it in special cases, and not only consent, but such acts equivalent to consent as may be considered a waiver, and as would equitably estop a party from attempting to remove his case.[6]

[5] Kingsbury v. Kingsbury, Fed. Cas. No. 7,817; First Nat. Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

[6] Hanover Nat. Bank v. Smith, Fed. Cas. No. 6,035; Case v. Olney (C. C.) 106 Fed. 433. Compare Atlanta, K. & N. Ry. Co. v. Railway Co. (C. C. A.) 131 Fed. 657.

In West Virginia v. King [7] a defendant applied to a state court for removal of a case, and the court refused his petition. He thereafter asked for an amendment of his pleadings, which was allowed by the court, and applied to the state court of appeals for a writ of prohibition designed to give the case in the state court a certain shape to his advantage. It was held that this action of his was a waiver of his right to remove.

It is difficult to understand, however, how, after a petition has been filed and refused, and proper exceptions taken, any steps in the state court looking to setting up the best defense thereto can be considered a waiver. The Supreme Court has frequently decided that, after a petition to remove has been refused, the party may go on and resist the case in the state court, or prosecute it in the federal court and disregard the state court, or do both.[8]

But it is not a waiver of the right to remove, where a nonresident defendant enters a special appearance in a state court, and asks to set aside a judgment against him for want of service, and takes a bill of exceptions to the refusal of the court to do so.[9]

Nor is it a waiver of the right to remove to give an attachment bond in the state court in order to release property from attachment.[10]

Although a defendant in a particular case can waive his right to remove, either by express consent or by acts equivalent thereto, he cannot agree generally not to remove cases to the federal courts, nor can a state statute require such an agreement, as it would be in fraud of the jurisdiction of the courts. This question has come up frequently in cases where state legislatures attempt to impose on foreign corporations, as a condition of allowing them to do business in

[7] (C. C.) 112 Fed. 369.

[8] CHESAPEAKE & O. RY. CO. v. WHITE, 111 U. S. 134, 4 Sup. Ct. 353, 28 L. Ed. 378.

[9] Baumgardner v. Fertilizer Co. (C. C.) 58 Fed. 1.

[10] Purdy v. Wallace, Muller & Co. (C. C.) 81 Fed. 513.

the state, an agreement that they would not remove their cases to the federal courts.

In Doyle v. Continental Ins. Co.[11] there are expressions in the opinion which would seem to imply that a state legislature could direct its officers to revoke a license granted to a foreign corporation if a foreign corporation removed a case, on the ground that the state, having the right to refuse the privilege of doing business entirely to a corporation, could not have its action or instructions to its own officers inquired into.

But in the later case of Barron v. Burnside[12] the Supreme Court explained that the only question decided in the above case was that an injunction would not lie against a state officer to prevent him from revoking such a license, and that such a condition in a state statute was absolutely void; and this case has been followed since in many cases.[13]

The principle on which these cases turn is that the right to remove is a constitutional right, of which a party cannot be deprived by state legislation.

On the same principle, a state cannot limit to its own courts the enforcement of a controversy of which Congress has given the federal courts jurisdiction under the provisions of the federal Constitution. If the controversy is such as can be constitutionally conferred on the federal courts by Congress, and if it has been so conferred, then the act of the state in giving its own courts jurisdiction of itself gives the federal courts jurisdiction over it. For instance, in Lincoln Co. v. Luning[14] a state statute gave the right to sue a county simply in the state courts. It was held that a nonresident could bring a suit against the county in the federal courts.

[11] 94 U. S. 535, 24 L. Ed. 148.

[12] 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915.

[13] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; SOUTHERN RY. CO. v. ALLISON, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078.

[14] 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766.

In Smith Middlings Purifier Co. v. McGroarty [15] the state statute limited the procedure to its probate courts. But the Supreme Court, considering that the question involved was not a mere probate proceeding, but a controversy between citizens of different states, held that it could be originally brought in the federal courts.

The above cases were both cases of original suits in the federal courts. Clark v. Bever [16] was a case where a decedent's estate was being settled in a probate proceeding, but there was a controversy between citizens of different states as to their rights in these probate proceedings. The court held that such a controversy could be removed into the federal court.

In Kirby v. Chicago & N. W. Ry. Co.[17] a condemnation proceeding in a court was held to be removable into the federal courts.

SCOPE OF THE JURISDICTION.

113. The jurisdiction of the circuit courts by removal from the state courts applies in the following cases:

(a) Federal questions.

(b) Other cases falling under the original jurisdiction of the federal court as follows:

(1) Suits by the United States;

(2) Suits between citizens of different states;

(3) Suits arising from conflicting land grants of different states;

(4) Suits between citizens and aliens.

(c) Suits containing separable controversies between citizens of different states.

(d) Suits between citizens of different states on ground of local prejudice or influence.

(e) Denial of equal civil rights.

(f) Cases against revenue officers, etc.

[15] 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346.

[16] 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88.

[17] (C. C.) 106 Fed. 551.

The Statutes Authorising Removal, and the Cases Authorized by Them.

The statutes regulating removal of cases to the federal courts have existed in some form from the original judiciary act of 1789. They have been frequently changed and amended, sometimes by extensions and sometimes by restrictions, according to the views of public policy which prevailed at different periods in our federal history. The act which extended the right of removal farthest was the act of March 3, 1875, but this was very much narrowed by the act of March 3, 1887, which amended its principal section in such a way as greatly to restrict the cases removable, and the time within which they should be removed. This act, in its original form, was most inaccurate, and consequently the act of August 13, 1888, was passed to correct the mistakes of grammar and rhetoric which had been made in the first act. For convenience hereafter this last act will be treated as the act in force, though it practically made no change in the policy of the act of March 3, 1887.

In connection with the original jurisdiction of the federal courts, the first section of this act has already been quoted in full.[18] The second and third sections of the act provide for removal from the state courts in the vast majority of instances where that removal can now be had. Its first sentence provides for removal, under certain circumstances, of cases arising under the Constitution and laws of the United States, or federal questions, as they are commonly termed. This provision is independent of citizenship.

The second sentence of this section provides for the removal of cases dependent on diverse citizenship which could be originally instituted in the federal courts under the provisions of section 1, and which, as already seen, cover not only controversies between citizens of different states, but controversies between citizens of a state and foreign states, and controversies between citizens of the same state claiming un-

[18] Ante, p. 190.

der land grants of different states. This first sentence, however, provides only for removing the entire case.

The third sentence of this second section provides for removing a controversy in the main case which is between citizens of different states, and which can be fully determined as to them, or controversies commonly termed separable. This provides only for controversies between citizens of different states, not for controversies between citizens and aliens.

The fourth sentence of the second section provides for the removal of controversies where prejudice or local influence can be made to appear. This covers only cases between citizens of different states.

The last half of the third section of this act provides for controversies between citizens of the same state claiming under land grants of different states. It enlarges and practically supersedes section 647 of the Revised Statutes. Independent of these provisions in section 3, such a case would have been covered by the provision of section 2, which provides for the removal of any suit which could have been originally brought under the provisions of section 1 of the act, for that section names among such cases controversies between citizens of the same state claiming lands under grants of different states, as has been previously shown.[19]

The next class of cases for which a removal is provided is cases against persons denied any civil right, and is covered by section 641 of the Revised Statutes.[20] This statute is still in force, and under this provision both civil and criminal cases can be removed.

The next provision as to removal is the case of suits and prosecutions against revenue officers, and is covered by section 643, which is still in force.[21]

The next provision is for the removal of suits by aliens against nonresident citizens of a state who are acting as

[19] Ante, p. 225.
[20] U. S. Comp. St. 1901, p. 520.
[21] U. S. Comp. St. 1901, p. 521.

civil officers of the United States, and is covered by section 644 of the Revised Statutes.[22]

This section is not expressly repealed or preserved by the act of August 13, 1888. In cases involving more than $2,000, it is practically covered by that act, but it would seem to be still in force as to all cases not covered by that act.

FEDERAL QUESTIONS.

114. In suits of a civil nature at law or in equity, the defendant or defendants are given a right of removal from the state to the federal court in cases arising under the Constitution or laws of the United States, or treaties made under their authority. In order for a case to be removable under this principle, the existence of the federal question must be apparent on the face of the plaintiff's pleadings, and it must be such a case as would be cognizable by the court if the same were originally brought therein.

Cases Arising under the Constitution and Laws of the United States, Commonly Called Federal Questions.

This is the first class named in the second section of the act of August 13, 1888, which, as stated above, covers the great mass of removable cases, and hence it is best to quote the section in full in this connection. It is as follows:

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are

[22] U. S. Comp. St. 1901, p. 523.

given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.

"At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine

into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." [23]

Analyzing the first sentence of this section, it will be seen that, in order to remove a case under its provisions, it must be, first, a suit of a civil nature, at law or in equity; second, it must arise under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the circuit courts are given original jurisdiction by the preceding section; third, it is removable only by the defendant.

The question what constitutes a suit of a civil nature at law or in equity has been discussed in connection with the original jurisdiction of the circuit court,[24] to which reference is now made.

The same general principles apply in connection with the removal of cases. As has been seen in that connection, condemnation proceedings, if in a court, and involving on their face a right arising under the laws of the United States, are cognizable in the federal courts, and hence may be removed.[25]

As shown, also, in that same connection, a mandamus proceeding is not such a suit as can be originally brought, and hence not such a suit as can be removed.[26]

[23] U. S. Comp. St. 1901, p. 509. [24] Ante, p. 192.

[25] Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; City of Terre Haute v. Railroad Co. (C. C.) 106 Fed. 545; Kirby v. Railroad Co. (C. C.) 106 Fed. 551.

[26] Indiana v. Railway Co. (C. C.) 85 Fed. 1.

In order to permit the removal of a case as arising under the Constitution and laws of the United States, it is well settled that this must appear on the face of the plaintiff's pleadings, and cannot be made to appear by the averments of the petition to remove. The construction of the act of August 13, 1888, in this respect makes a radical difference between it and the act of March 3, 1875, which it amended. Under that act, if it appeared either by the plaintiff's pleadings, or the defense thereto, or in any way, at the time of filing the petition of removal, that the case turned on a federal question, it was removable. The reason of the difference in construction is that the later act expressly provides that only those cases can be removed which could have been brought originally in the circuit court. It has been seen in discussing the original jurisdiction that the circuit court has no jurisdiction on the ground of a federal question being involved unless that appears from the plaintiff's own statement of his own case, and that even a statement in the plaintiff's case, by way of anticipation, that the defendants will set up a federal question, will not give the court jurisdiction. Hence, as the courts would not have had jurisdiction unless this appeared from the plaintiff's own case, it follows that they cannot have jurisdiction of a case removed from a state court as involving a federal question unless the plaintiff's own statement of his case in the state court necessarily shows that a federal question was involved.

The leading case on this subject is Tennessee v. Union & Planters' Bank.[27] Under this principle there are many cases which naturally involve a federal question on the trial, and which cannot be removed because there is nothing on the face of the plaintiff's pleadings to show that a federal question was involved. For instance, it has been seen that a suit against a United States marshal for an illegal levy involves a

[27] TENNESSEE v. BANK, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. See, also, Minnesota v. Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870.

federal question. Yet if the plaintiff so words his declaration that nothing appears on the face of it to show that the defendant is a United States marshal, or that he is acting in any federal capacity, but shows merely an ordinary action of trover, the case could not be removed; for the federal question would only come out in defense in such case, and hence would not appear in the plaintiff's petition. This important distinction must be borne closely in mind.[28]

Suits against Corporations Organized under Federal Law.

This principle works out interestingly in suits against corporations owing their existence to federal legislation.

It has long been settled that a federal question is involved if a suit is brought against a corporation organized by virtue of federal law. In Oregon Short Line & U. N. R. Co. v. Skottowe,[29] the plaintiff's declaration alleged that the defendant corporation was organized under state statutes, and merely held certain additional powers under an act of Congress. The court held that here, too, in order to remove on the ground of being a federal corporation, it must appear on the face of the plaintiff's pleadings to have been such, and that it did not become such merely because an act of Congress gave it some additional powers.

But in the later case of Texas & P. R. Co. v. Cody,[30] which was a suit by a resident of the district where the suit was brought against a nonresident corporation organized under federal law, the court held that the case could be removed by the defendant as a nonresident defendant, independent of the question of its paternity. It went on to say, however, that, while the general principle announced in the Oregon Short Line Case was correct, the case could be removed on the ground of the defendant being a federal corporation if it became such by virtue of an act of Congress which they were

[28] WALKER v. COLLINS, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76; Mayo v. Dockery (C. C.) 108 Fed. 897.

[29] 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048.

[30] 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132.

required to notice judicially, even though there was nothing on the face of the plaintiff's declaration to show it; thus restricting to some extent the principle laid down in the Oregon Short Line Case.

Independent, however, of this question of pleading, it is well settled that the mere fact that a corporation is a federal corporation injects a federal question into the case. If it cannot be removed on the ground that such federal question is involved, for the reason that it does not so appear on the pleadings, there are many cases where this fact would give at least a right of appeal from the state court to the Supreme Court if the action of the state court deprived the company of any right claimed under the federal acts.

However, the mere fact that the suit in a state court is against a receiver appointed by a federal court does not involve a federal question. In such case the statute permits suits against the receiver, who is appointed under the general chancery powers of the court, and the mere fact that he is appointed by a federal court does not make it a federal question.[81]

A federal question is not involved when a suit is brought in a state court to enjoin the importation of armed men into the state, for the purpose of controlling a strike, by a corporation organized outside of the state; the ground of the suit being that their importation would be dangerous to the peace and good order of the state.[82]

A Suit is not Removable on the Ground that a Federal Question is Involved unless It is a Case of Which the Circuit Court is Given Original Jurisdiction by the First Section of the Act.

A reference to this section shows that, in order for the federal court to have original jurisdiction if the suit were brought

[81] Gableman v. Railway Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, limiting Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

[82] Arkansas v. Railroad Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144.

there on the ground that a federal question was involved, it must not only be a suit of a civil nature at common law or in equity, but it must involve, exclusive of interest and costs, the sum or value of two thousand dollars. This monetary limit has been discussed in connection with the original jurisdiction.[33]

This restriction, however, limiting the right of removal to suits which could be originally brought in a federal court, refers simply to the question of jurisdiction over the subject-matter, not to the latter part of the section prescribing the district of suit. The latter requirement is a mere question of jurisdiction over the person, and is waivable, whereas the former is a question of jurisdiction, vital to maintaining any suit at all, and cannot be waived. It is settled that it was the intention of Congress by this restriction on removal of cases to limit them simply in reference to jurisdiction over the subject-matter, not in reference to jurisdiction over the person.[34]

This limitation as to original jurisdiction would shut out cases over which federal courts, as courts of equity, have no jurisdiction, even though the state court would have by reason of a special state statute. As an illustration, many states have statutes permitting attacks on deeds alleged to be fraudulent, without obtaining a previous judgment. Hence a suit brought originally in a state court would be within the jurisdiction of that court. The federal courts have held, however, that these statutes cannot confer equity jurisdiction on the federal courts. Hence a case of this sort cannot be removed from a state court to the federal court, as the federal court could not entertain jurisdiction of it after it was removed: and, if such case were removed, it would remand it.[35]

[33] Ante, p. 196.

[34] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

[35] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804.

On the other hand, if the state court in which the suit was originally brought would have no jurisdiction over it, and the case was removed into the federal court, the latter court would acquire no jurisdiction thereby, even though it might be a case which might have been originally instituted in the federal court. In such case, the federal court would not remand, as the state court is the one which is lacking in jurisdiction, but would dismiss the case, for the federal court could not acquire jurisdiction by removal from a court which did not have jurisdiction in the first instance.

A good illustration of this principle is those cases where suits have been instituted in a state court to enforce certain provisions of the interstate commerce act, the enforcement of which is conferred by that act upon the federal courts alone. In such case the state courts will have no jurisdiction, and if it was removed, the federal courts would acquire no jurisdiction, even though the federal courts would have jurisdiction if the suit had originally been brought there.[36]

Where a case is removed of which the federal court would have no jurisdiction, even the removing party could question the jurisdiction. This follows necessarily from the fact that, if the want of jurisdiction appears, the court can dismiss the case of its own motion, and hence either party can question it.[37]

Under this branch of jurisdiction of cases removed on the ground of a federal question being involved, the whole case goes up if a substantial federal question is really involved. In such case the court obtaining jurisdiction on the ground of a federal question will consider all the issues joined, whether federal or not.[38]

[36] Auracher v. Railroad Co. (C. C.) 102 Fed. 1; Sheldon v. Railroad Co. (C. C.) 105 Fed. 785.

[37] German Savings & Loan Soc. v. Dormitzer, 116 Fed. 471, 53 C. C. A. 639.

[38] Omaha Horse Ry. Co. v. Tramway Co. (C. C.) 32 Fed. 727; Texas v. Cattle Co. (C. C.) 49 Fed. 593.

The party entitled to remove under this provision is simply the defendant, the theory of the right to remove at all being that it is necessary to protect the party from state influences. The plaintiff, having voluntarily resorted to the state court to assert such a right, could not complain if he is not allowed, after suing in that court, to proceed to another. Hence in this case the removal is given to the defendant or defendants. This has been construed to mean all of the defendants. If they are all necessary parties, they must all join in the petition for removal, or the case cannot be removed.[39]

When, however, it is said that all the defendants must join in the petition for removal, it means all those who are necessary parties as defendants. The right is not defeated by the failure of nominal or formal parties to join in the petition.[40]

Even important parties who are not served, and who do not appear, are not in this sense parties to the suit, and their failure to join in the petition will not defeat the right of removal.

Tremper v. Schwabacher [41] was a suit against several partners. Only one was served with process. The others, not being served, did not appear. The court held that the one who was served could remove the case, though the others did not join in the petition.

The question what parties are necessary in suits in the federal courts has been discussed in a previous connection, to which reference is now made.[42]

[39] Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; German Savings & Loan Ass'n v. Dormitzer, 116 Fed. 471, 53 C. C. A. 639; Miller v. Bank (C. C.) 116 Fed. 551.

[40] Henderson v. Cabell (C. C.) 43 Fed. 257; Shattuck v. Insurance Co., 58 Fed. 609, 7 C. C. A. 386.

[41] (C. C.) 84 Fed. 413.

[42] Ante, pp. 212, 220.

SUITS BY THE UNITED STATES.

115. The federal jurisdiction by removal from the state courts extends to suits by the United States.

As the federal courts are given original jurisdiction of these suits by the first section of the act of August 13, 1888, it follows that the nonresident defendant could remove such a suit into the federal court if brought in a state court, and that, too, independent of the amount involved, as it has been decided that the federal courts have original jurisdiction of suits by the United States, even though the amount involved is less than two thousand dollars.[48]

[48] U. S. v. SAYWARD, 160 U. S. 493, 16 Sup. Ct. 371, 40 L. Ed. 508.

CHAPTER XIV.

THE CIRCUIT COURTS (Continued)—JURISDICTION BY REMOVAL (Continued).

116. Controversies between Citizens of Different States.
117. Devices to Prevent Removal.
118. Controversies between Citizens of the Same State Claiming Lands under Grants of Different States.
119. Controversies between Citizens of a State and Foreign States, Citizens or Subjects.
120. Parties Entitled to Remove.
121. Separable Controversies.
122. Removal on Ground of Prejudice or Local Influence.
123. Removal because of State Denial of Equal Civil Rights.
124. Removal of Suits against Officers or Persons Enforcing the Internal Revenue Laws.

CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES.

116. The first section of the act of August 13, 1888, gives the federal courts jurisdiction of suits of a civil nature at common law or in equity in which there shall be a controversy between citizens of different states, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000; and the second section gives the right of removal in such cases. This is much the most frequent ground of removal in actual practice. In order to give the right of removal, the requisites must concur which have been discussed in connection with the original jurisdiction of such suits.[1]

If the suit, for instance, is not such a suit as the federal court could entertain under its general equity jurisdiction, even though the state court could entertain it, like a suit by a simple-contract creditor to set aside a conveyance which

[1] Ante, p. 189.

could be brought in a state court by virtue of a state statute, then the federal courts cannot take jurisdiction, but in such case would have to remand.[2]

In this class of cases, also, it is well settled that, if the court has jurisdiction over the subject-matter of the case, it may be removed, even though the suit is not brought in the district of the defendant's residence.[3]

There is some conflict of authority on the question whether a suit is removable into the federal courts which is brought in the state court included in a federal district where neither plaintiff nor defendant may reside. There is a line of cases which hold that in such case, even though that may be a question of personal jurisdiction, the suit cannot be removed unless the question of the place of suit is waived by both plaintiff and defendant.[4]

But the better and preponderating authority is to the effect that the question of the district of suit is one in which the defendant, not the plaintiff, is the one interested. Hence a defendant who applies for the removal of a case brought in a district wherein he does not reside is entitled to it, even though the plaintiff does not live in that district.[5]

It is certainly well settled that the question of the place of suit is not a question of jurisdiction over the subject-matter. The federal courts have jurisdiction if the controversy is between citizens of different states, no matter where they may happen to reside. If a suit is brought in a district where neither the plaintiff nor the defendant resides, and that suit is brought in the first instance in a federal court, it is a subject-matter within the jurisdiction of that court. The defendant, by

[2] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804; GREELEY v. LOWE, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

[3] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; Virginia-Carolina Chemical Co. v. Insurance Co. (C. C.) 108 Fed. 451.

[4] Foulk v. Gray (C. C.) 120 Fed. 156.

[5] American Finance Co. v. Bostwick, 151 Mass. 19, 23 N. E. 656.

appearing, waives all objection to the place of suit. Hence the Supreme Court has held that this is undoubtedly within the jurisdiction of the federal courts, and that the place of suit is a mere personal privilege.[6]

This being true, it is difficult to see why a defendant who can waive the privilege by appearing and pleading in an original suit cannot equally appear in a state court and remove his case; and hence it is believed that such a case can be removed, and that the authorities holding that doctrine are better founded on reason and better in accord with the language of the act.

Removal as affected by assignment.

This clause limiting removable cases to those cases of which the circuit courts are given jurisdiction by the first section has wrought one other important change in the law, which should be borne in mind in reading the decisions. The previous acts did not have such a clause, and hence it was held under them that the clause forbidding the assignee to bring suit unless his assignor could also sue applied only to cases originally instituted in the federal courts, and did not prevent the removal of such cases when originally instituted in the state courts. But the above change in the law has placed original suits and removable cases on the same footing, so that now a suit by an assignee in a state court cannot be removed into the federal court on the ground of diverse citizenship unless it could have been originally instituted in the federal court.[7]

In discussing the original jurisdiction of the courts, it has been seen that all the parties on each side must be capable of suing or being sued. This same principle applies to cases removable on the ground of diverse citizenship.[8]

[6] Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98.

[7] MEXICAN NAT. R. CO. v. DAVIDSON, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; Board of Com'rs of Delaware County v. Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674.

[8] Ante, p. 220; Gage v. Carraher, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; Blake v. McKim, 103 U. S. 336, 26 L. Ed. 563.

It is also true in removal as in original cases that this principle only applies to necessary parties, and that the joinder of nominal or unnecessary parties will not defeat the right of removal.[9]

DEVICES TO PREVENT REMOVAL.

117. The removal of a case may be prevented by various devices, as by assigning the cause of action to a plaintiff incompetent to sue in the federal courts, or by so framing the suit as to make parties defendants who would defeat the jurisdiction; and such devices are successful in the absence of bad faith.

It has been seen in the previous discussion [10] that devices to confer jurisdiction upon the federal courts are forbidden by the law. It is, however, a rule which does not work both ways. Devices to prevent such jurisdiction are frequently successful.

In Oakley v. Goodnow [11] an Iowa corporation which had a claim against a citizen of New York transferred it to another citizen of New York under an agreement that the latter should act as trustee in collecting the fund, and account to the assignor for it. The defendant (the law not then limiting the right of removal to nonresident defendants) attempted to remove the case to the federal court, claiming that this was a mere device to defeat jurisdiction. The Supreme Court, however, held that it was a device which accomplished its purpose, and that his only relief was in the state court.

It is not an uncommon practice to join other defendants for the purpose of defeating jurisdiction.

[9] Patterson v. Railroad Co. (C. C.) 111 Fed. 262; Sully v. Drennan, 113 U. S. 287, 5 Sup. Ct. 453, 28 L. Ed. 1007; St. Louis & S. F. R. Co. v. Wilson, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66; Peper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435; Mahon v. Somers (C. C.) 112 Fed. 174; Corbitt v. Bank (C. C.) 113 Fed. 417; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69.

[10] Ante, p. 246. [11] 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61.

In personal injury suits, for instance, against nonresident corporations, it is not uncommon for a plaintiff who may desire to prevent removal to join with the corporation itself the employé who was responsible for the accident, if his citizenship is the same as that of the plaintiff. Under such circumstances the right of removal would be defeated, for the plaintiff undoubtedly has the right, in an honest discretion, to bring his suit this way; and the right of removal would be defeated, even though the parties joined might have different defenses, for the right of removal is judged independent of the defense, and the court has no right to dictate to the plaintiff how he should bring his suit.[12]

On the other hand, there are some strong cases which hold that where such a joinder is made with the knowledge on the plaintiff's part that the allegations on which it is based are false, and that he cannot expect to recover, and with the intent on his part to defeat the right of removal, he will fail in his object, and the court, on proper charges in the petition, will permit such removal. Such a right of removal, however, if sustainable at all under these authorities, rests upon the necessity of practically proving bad faith.[13]

Rearrangement of Parties.

In passing upon the right of removal, the same principle applies as in original suits. The court judges of the right by the actual interest of the parties, and not by the method in which the pleader may choose to arrange them.[14]

[12] Charman v. Railroad Co. (C. C.) 105 Fed. 449; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; Person v. Railroad Co. (C. C.) 118 Fed. 342. Compare Helms v. Railroad Co. (C. C.) 120 Fed. 389.

[13] Hukill v. Railroad Co. (D. C.) 72 Fed. 745; Union Terminal R. Co. v. Railroad Co. (C. C.) 119 Fed. 209.

[14] MacGinniss v. Mining Co., 119 Fed. 96, 55 C. C. A. 648; Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520.

CONTROVERSIES BETWEEN CITIZENS OF THE SAME STATE CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES.

118. As the federal courts are given jurisdiction of controversies between citizens of the same state claiming lands under grants of different states, such a case would be removable.

In such case, however, there is a special provision in section 3 of the act of August 13, 1888, which shows the method under which it is necessary to make it appear to the court that such a question is involved. The language of that section is as follows: "And if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead

or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim." [15]

CONTROVERSIES BETWEEN CITIZENS OF A STATE AND FOREIGN STATES, CITIZENS OR SUBJECTS.

119. In such case the right of removal exists, as it is a class of which the federal courts are given original jurisdiction by the first section of the act of August 13, 1888.

It is well settled, as, indeed, is plain from the language of the statute itself, that this class does not cover controversies between aliens. Of such cases the federal courts have no jurisdiction.[16]

There is a conflict of decision on the question whether a federal court would have jurisdiction in a case where citizens of a state are plaintiffs, and citizens of a different state and aliens are defendants.

In Tracy v. Morel [17] it is held that this latter is a casus omissus in the statute, and that the federal courts would not have jurisdiction. On the other hand, in Roberts v. Pacific & A. R. & Nav. Co.[18] Judge Hanford, in a well-considered opinion, holds that such a case would fall within the federal jurisdiction. It seems to the author that, however liberally the removal act ought to be construed, the line of decisions holding that the case does not fall within the jurisdiction of the federal courts best accords with the statute. If a federal court has jurisdiction, it must be under one of two phrases in the first section of the Act of August 13, 1888—either on the language, (1) "in which there shall be a controversy between citizens of different states"; or (2) "a controversy between citizens of a state and foreign states, citizens or subjects."

[15] U. S. Comp. St. 1901, p. 510.

[16] Merchants' Cotton Press & Storage Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; Pooley v. Luco (C. C.) 72 Fed. 561.

[17] (C. C.) 88 Fed. 801.

[18] (C. C.) 104 Fed. 577.

If the rulings of the federal courts in other connections to the effect that a "controversy between citizens of different states" means a controversy in which all the citizens on one side and all the citizens on the other are citizens of different states, jurisdiction in the case supposed could certainly not be supported upon that, for one of the parties defendant in such case is not a citizen, but an alien. On the other hand, if that same principle of construction is applied to the second class, a controversy in the case supposed is not between citizens of a state and foreign states, citizens or subjects, for one of the defendants is neither a foreign state, citizen nor subject, but a citizen of a different state. This would seem to be the necessary construction of the statute, and this is the view taken by the standard work on the subject.[19]

A suit by an alien against a corporation, nonresident in the district where the suit is brought, is removable by the nonresident corporation.[20]

PARTIES ENTITLED TO REMOVE.

120. Under all the classes of cases previously discussed, except cases arising under the Constitution and laws of the United States, the right of removal is in the defendant, provided he is a nonresident.

As the right to confer jurisdiction in such cases on the federal courts is based on the theory of protection from local prejudice or injustice, it is natural that only the nonresident should have the right to remove in cases where the jurisdiction does not depend upon a federal question; and the statute follows this theory in the second sentence of section 2 of the act of August 13, 1888.

Here, too, the principle applies that all of the defendants who are necessary parties must join in the petition to remove,

[19] Black, Dill. Rem. Causes, § 34.

[20] Stalker v. Car Co. (C. C.) 81 Fed. 989.

and that all must be nonresidents. Even though the citizenship might otherwise be such as would give the federal courts jurisdiction over the subject-matter, still in this case only the nonresident can remove, and this is well settled by the authorities.[21]

If, however, the permanent residence of the defendant is outside of the district where suit is brought, his mere temporary residence in the district will not defeat his right of removal.[22]

SEPARABLE CONTROVERSIES.

121. The jurisdiction of the circuit court by removal from state courts extends to controversies wholly between citizens of different states, and which can be fully determined as between them, when removal could be had as to any one or more of the defendants under the general principles heretofore discussed; such right of removal being granted in such cases to any one or more defendants actually interested.

In order to justify a removal on this ground, the controversy in a suit must be a separate and distinct cause of action, on which a separate suit could be maintained as between the parties thereto, independent of the others, and not a mere incidental controversy growing out of the main suit.

This class of removal cases is commonly called separable controversies.

In order to obtain a removal on this ground, it must appear from the plaintiff's pleadings that the controversy which it is desired to remove is a separable controversy.

The third sentence of section 2 of the act of August 13, 1888, provides: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as be-

[21] Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; Eddy v. Casas (C. C.) 118 Fed. 363; Parkinson v. Barr (C. C.) 105 Fed. 81; Union Terminal R. Co. v. Railroad Co. (C. C.) 119 Fed. 209.

[22] Chiatovich v. Hanchett (C. C.) 78 Fed. 193.

tween them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

This is the class of removable cases commonly spoken of as separable controversies—a class which has been much discussed in the courts. In considering it, it must be observed in the first place that it applies only to controversies between citizens of different states, so that controversies between citizens and aliens are not included.[23]

In this class of cases, although the citizenship of the parties on whom the right of removal is conferred can be made to appear in the petition for removal, and need not necessarily appear in the plaintiff's pleading, as such an allegation is not a part of any system of pleading, it must nevertheless appear from the plaintiff's pleading that the controversy which it is desired to remove is a separable controversy. Its capacity of severance must be decided solely upon the plaintiff's pleading, not upon the petition for removal, nor upon the defense set up. There may be separate issues in a case, but they do not constitute separable controversies. There may be defenses which are good as to some, and not as to others, but they do not make separable controversies.[24]

The courts have narrowed very much the cases which are removable under this act. As has been stated above, the fact that the issues or defenses are separate does not make the controversy separate. It is equally well settled that even a controversy which is separable does not give a ground of removal if that controversy is a question merely incidental to the main controversy in the cause, and not of itself the prin-

[23] Creagh v. Society (C. C.) 88 Fed. 1.

[24] Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693; Fidelity Ins., Trust & Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Riser v. Railroad Co. (C. C.) 116 Fed. 215.

cipal controversy. For instance, Graves v. Corbin [25] was a bill to subject partnership assets to the payment of debts, and to set aside, as fraudulent, certain judgments confessed by the partnership. It was held that one of these judgment creditors could not remove the case, as the question of the validity of his judgment, though depending on different grounds, was a mere incident to the main litigation, which was to wind up the partnership assets.

So, in the leading case of Torrence v. Shedd,[26] which was a partition suit, a dispute between two of the parties in that suit as to their relative interests in the share of one of these parties was not so separable as to give the right of removal.

In Bellaire v. Baltimore & O. R. Co.[27] which was a proceeding by the city of Baltimore to condemn a right of way for a street across a strip of land, to which the owner and the lessee were made parties, it was held that the lessee could not remove, although its interests would be separately valued, as that was a mere incident to the main question, which was the right of condemnation at all.

In Colburn v. Hill,[28] which was a creditors' suit to wind up a corporation, and distribute its assets, and exclude certain defendants from sharing in the assets on the ground that a certain contract held by them with the corporation was invalid, it was held that these defendants could not remove the case on the ground of a separable controversy.

The Supreme Court has repeatedly said that, in order to justify a removal on this ground, the controversy in the suit must be a separate and distinct cause of action, on which a separate suit might have been maintained as between the parties therein interested, independent of the others.[29]

[25] 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462.

[26] TORRENCE v. SHEDD, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

[27] 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910.

[28] 101 Fed. 500, 41 C. C. A. 467.

[29] HYDE v. RUBLE, 104 U. S. 407, 26 L. Ed. 823; Fraser v. Jennison, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131.

Under these principles, suits on joint or joint and several contractual liabilities are not removable by some of the defendants. If the plaintiff elects to bring his suit in such a shape as to claim a joint liability against the defendants on contract, it is not for them to prevent him from trying his suit in his own way; and part of them cannot, therefore, obtain a removal on this ground.[30]

On the same principle, a case which appears from the plaintiff's declaration to be a joint action in tort against severl defendants cannot be removed by one of those defendants.[31]

There have been many interesting decisions on the question of suits for personal injuries where both the defendant corporation and the employé causing the accident are sued. In such case, if, as far as the pleadings show, the cause of action is a joint one, it cannot be removed by one of the two defendants. This, however, though to a certain extent a question of pleading, depends upon the further question whether such suits are, in fact and in law, joint suits against the employer and employé.

In the case of Chesapeake & O. Ry. Co. v. Dixon,[32] referred to in a previous connection, the Supreme Court was careful to base its opinion upon the fact that the declaration alleged joint negligence; and the decision was influenced to

[30] Louisville & N. R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Western Union Tel. Co. v. Brown (C. C.) 32 Fed. 337; Guarantee Co. of North America v. Trust Co. 80 Fed. 766, 26 C. C. A. 146 (reversed 173 U. S. 582, 19 Sup. Ct. 551, 43 L. Ed. 818, but not on this point).

[31] Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 29 L. Ed. 331. CHESAPEAKE & O. RY. CO. v. DIXON, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Marrs v. Felton (C. C.) 102 Fed. 775; Central Ohio R. Co. v. Mahoney, 114 Fed. 732, 52 C. C. A. 364; Riser v. Railroad Co. (C. C.) 116 Fed. 215.

[32] 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. See, also, Southern Ry. Co. v. Carson, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907.

some extent by the fact that in Kentucky, where the action arose, the decisions were that a joint action by an injured party against an employer and employé was one in which they were jointly liable. But in the recent case of Helms v. Northern Pac. R. Co.[33] Judge Amidon, in an exceedingly well considered opinion, reviewing the authorities, including the above-named Supreme Court case, held that under certain circumstances, at least, such a suit would not be a suit for a joint tort; that the liability of a master and servant rested on different grounds; and that, unless it appeared from the declaration, or at least was consistent with the declaration, that the negligence complained of was such a negligence as gave a joint cause of action, the defendant could remove. The case was a suit by a servant against the fellow servant who caused the negligence, and the corporation who employed them both. At common law the corporation would not have been liable, on account of the fellow-servant principle, but was made liable by a state statute. Consequently he held that the liability of the defendant employé was on the ground of negligence, and that of the company on the language of the statute, which did not necessarily require negligence, and hence that the causes of action were separate, and that the case could be removed.

In separable controversies the principle also applies that the right of removal depends upon those who are necessary parties, grouped or rearranged according to the actual interests of the parties, and not according to the mere fancy of the pleader.[34]

A party is not a necessary party who has not been served with process and brought before the court. In Berry v. St. Louis & S. F. R. Co.,[35] which was a suit against a resident and nonresident, and in which process was not served on the resi-

[33] (C. C.) 120 Fed. 389.

[34] Geer v. Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; Lamm v. Copper Co. (C. C.) 111 Fed. 241.

[35] (C. C.) 118 Fed. 911.

dent defendant, it was held that the nonresident could remove the case, even though the liability asserted was joint and several, as the plaintiff, by not bringing the resident defendant into court, had voluntarily elected to make the controversy separable.

In order to sustain a removal on the ground of separable controversy, it is also necessary—as, indeed, is stated in the statute—that the controversy must be fully determinable as between the parties to that controversy.[36]

The following are instances of controversies held separable under this sentence of the statute:

A suit to avoid an alleged fraudulent transfer between two corporations, to which the directors of one of the corporations were made parties, though not for the purpose of any actual relief against them, was held removable, though the plaintiff and some of the directors were citizens of the same state.[37]

A suit against a corporation alleged to be insolvent, and a second defendant alleged to have assumed its debts, was held to be removable by the second defendant.[38]

A suit involving the liability of the officers of a corporation for damages for alleged misconduct as such officers, no conspiracy or concerted action among them being alleged, was held removable by some of these officers.[39]

A suit against two defendants in tort on entirely disconnected grounds was held to be removable.[40]

A suit by a stockholder against his corporation and a second corporation, attacking the management of the first cor-

[36] East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Wilson v. Oswego Tp., 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Merchants' Cotton Press & Storage Co. v. Insurance Co., 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195.

[37] Geer v. Alkali Works, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122.

[38] Mecke v. Mineral Co., 93 Fed. 697, 35 C. C. A. 151

[39] Youtsey v. Hoffman (C. C.) 108 Fed. 693.

[40] Coker v. Mills (C. C.) 110 Fed. 803.

poration by the second, was held removable by the second, as the cause of action asserted was one in which the stockholder and his own corporation were practically interested alike, and against the second.[41]

A bill to quiet title against several defendants not claiming through any common source was held removable by some of these defendants.[42]

On the other hand, in Little v. Giles [43] a suit to quiet title, which alleged that the defendants were conspirators in their efforts to cloud the title, was held not to be a separable controversy.

The parties entitled to remove on the ground of a separable controversy are, in the language of the statute, either one or more of the defendants actually interested.[44]

Does This Apply to Resident Defendants?

There is a difference of decision on the question whether this right of removal under the separable controversy clause is conferred on any defendants, or simply on nonresident defendants. On the one hand, it is urged that the reason for giving the removal is the same as in any other case where it is limited to nonresidents, and that this must have been the policy of Congress. On the other hand, it is urged that the language of the statute does not limit the right to nonresident defendants.[45]

A careful perusal of the statute would seem to indicate that the authorities holding any defendant, whether resident or not, entitled to remove, best accord with its language. Where the language of the statute itself is plain, it is unnecessary to resort to rules of construction or policy. A legislature is presumed to have said what it meant, and to have meant

[41] Lamm v. Copper Co. (C. C.) 111 Fed. 241.

[42] Carothers v. Smelting Co. (C. C.) 116 Fed. 947.

[43] 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269.

[44] Rand v. Walker, 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907.

[45] Stanbrough v. Cook (C. C.) 38 Fed. 369, 3 L. R. A. 400; Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432.

what it said. When this entire section is examined, it is to be observed that the first section, which gives the right of removal in federal questions, confers it upon the defendant or defendants whether they are resident or not. Then the second section, which gives the right of removal on the ground of citizenship, gives the right only to the defendant or defendants who are nonresidents. Then comes the third clause, which is the one under discussion, and which simply speaks of the defendants, and says nothing about their residence. Then the fourth clause, conferring the right in cases of prejudice or local influence, limits it to the defendant who is a citizen of another state. Congress, in thus varying the language in these different sentences of the same section, must be presumed to have done so intentionally; and it would seem to be beyond the purview of the courts to read into its act a sentence that it has deliberately inserted in one place and omitted in another. In the judgment of the author, therefore, the defendant, whether resident or not, ought to have the right of removal on this ground.

It is important to observe in the consideration of this section that the effect of the removal of a separable controversy is to take with it not simply that controversy, but the entire suit. It was not the intent of Congress to split a suit up into different parts, and leave it to be considered by different courts; and the express language of the act itself is that when a controversy exists in a suit, and that is removed, the suit itself goes with it.[46]

And this is true even though the effect may be to take into the federal court, along with this separable controversy, other grounds of action of which the court would not have had jurisdiction, had they been brought in the federal court independently.[47]

[46] BARNEY v. LATHAM, 103 U. S. 205, 26 L. Ed. 514; Connell v. Smiley, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443; Wabash, St. L. & P. R. Co. v. Trust Co. (C. C.) 23 Fed. 513.

[47] Hoge v. Insurance Office (C. C.) 103 Fed. 513.

REMOVAL ON GROUND OF PREJUDICE OR LOCAL INFLUENCE.

122. This ground entitles the nonresident defendant to remove, but only on proof of the existence of such prejudice or local influence.

The fourth sentence of the act regulating removal of cases provides as follows: "And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, the said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

The elaborate provisions in the act of August 13, 1888, on the subject of removals on this ground, include the provisions of the old acts, and hence it is settled that they supersede and repeal the previous acts.[48]

It will be observed that the language of this sentence is quite different from those of the three preceding sentences. The first limits the removal of cases on the ground of a fed-

[48] Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; Hanrick v. Hanrick, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685.

eral question to those of which the circuit courts are given original jurisdiction by the preceding section. The second, regulating the removal of entire controversies on the ground of citizenship, also applies only to those cases of which the circuit courts are given jurisdiction by the preceding section. The third, authorizing removal on the ground of a separable controversy, limits such right to "any suit mentioned in this section," which amounts to the same thing. The fourth contains no such qualifying clause, and, independent of authority, it may very well be questioned whether this qualification was intended to be inserted. However, the Supreme Court, in Ex parte Pennnsylvania Co.,[49] in which the question involved was whether the two thousand dollar limit applied to causes removed on the ground of prejudice or local influence, held that it was the intention of Congress to limit these causes, also, to those of which the court would have had original jurisdiction. The court construed the first part of the sentence, "where a suit is now pending" to be equivalent to the words "and when in any suit mentioned in this section." This does not impress the author as a satisfactory construction of the statute. If Congress used the words "in any suit mentioned in this section" in one sentence, and the words "where a suit is now pending" in another, it is difficult to understand why the different phraseology was employed, especially when the two first sentences of the same act are taken into consideration. There are many reasons of policy for assuming that Congress intended to be more liberal in causes removed on the ground of prejudice or local influence. The principle on which the right of removal is given at all is the theory that there may be injustice. In all but this case, however, the removal does not depend upon proof of this fact, but is theoretical only. Here Congress was dealing not with a mere theoretical prejudice, but an actual one, required to be shown by proof, and to fix a monetary limit in such case is to leave un-

[49] 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

protected a nonresident in a case where he most needs protection. The small case is just as important to the poor litigant in those cases as the large case to the rich litigant.

The Parties.

The controversy removable under the language of the statute is "a controversy between a citizen of the state in which the suit is brought and a citizen of another state." Under this language controversies between citizens and aliens are not removable on this ground.[50]

In reference to the parties plaintiff, it is well settled that the word is used collectively, and that, under the principles established in other cases of jurisdiction, the plaintiffs, where there are more than one, must be citizens of the state where the suit is brought.[51]

Whether all the plaintiffs and all the defendants must be different in citizenship is a question on which there is a violent conflict of authority. Under the removal acts previous to the present, this was necessary.[52]

But the language of the present section is that "any defendant" may remove the case. Influenced by this language, there is a strong line of authorities to the effect that any defendant who is a citizen of another state from that in which the suit is brought can remove it, even though there are other defendants whose citizenship is the same as that of the plaintiff.[53]

On the other hand, there are authorities which hold that the controversy itself must be one in which all the plaintiffs are of a different citizenship from all of the defendants, and that, if the controversy is of that character, then any nonresident defendant may remove.[54]

[50] Grand Trunk R. Co. v. Twitchell, 59 Fed. 727, 8 C. C. A. 237.

[51] Gann v. Northeastern R. Co. (C. C.) 57 Fed. 417.

[52] Rosenthal v. Coates, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399.

[53] Montgomery County v. Cochran (C. C.) 116 Fed. 985; Jackson & Sharp Co. v. Pearson (C. C.) 60 Fed. 113; Bonner v. Meikle (C. C.) 77 Fed. 485.

[54] Campbell v. Milliken (C. C.) 119 Fed. 982.

This question has not been directly settled by the Supreme Court. If, however, the principles laid down in Ex parte Pennsylvania Co.[55] are to be followed, and the sentence conferring jurisdiction to remove on the ground of prejudice or local influence is subject to the qualification that it must be such a suit as was originally cognizable in the court, it is difficult to see how the Supreme Court can avoid holding, when the question is presented to it, that this principle regulates not merely the question of jurisdiction on the ground of amount involved, but also the question as to parties; and certainly it is the law, as to parties where the jurisdiction is governed by the test of jurisdiction over an original suit, that all the parties on each side must be different. The decision seems to the author to be conclusive of the question, and that all the parties plaintiff and all the parties defendant to the controversy must be citizens of different states. There are many cases which would come within the purview of this sentence of the original act under this construction—as, for instance, suits by a citizen of Virginia in Virginia against a citizen of Maryland and a citizen of West Virginia.

Conditions on Which Removal is Allowed—Procedure.

The statute gives the right of removal "when it shall be made to appear to the circuit court that from prejudice or local influence he will not be able to obtain justice in the state court or in any other state court to which he is entitled to remove the case."

There is nothing in the statute to show how this must be made to appear. The better authority is that a petition should be filed in the federal court alleging not merely the petitioner's belief or the bare statement of prejudice or local influence, but setting out such facts as would show it.[56]

It then becomes a question for the circuit court whether to require proof, and what kind of proof should be required.

[55] 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

[56] Schwenk v. Strang, 59 Fed. 209, 8 C. C. A. 92; Collins v. Campbell (C. C.) 62 Fed. 850.

The court must be not morally, but legally, satisfied of the existence of such prejudice or local influence; and it may, in its discretion, allow proof of such fact by affidavit.[57]

On this petition in the federal court an order is obtained to remove the case, which order should be filed in the state court.[58]

Then, if the plaintiff desires to contest the question of prejudice or local influence, he can do so by a motion to remand to the state court, on which the circuit court will hear such evidence as it may think material.[59]

The present statute differs from the old in requiring proof not merely that the defendant cannot obtain justice in the state where the suit is pending, but in any other state court to which he has the right to remove it. This qualifying clause, however, only applies where the plaintiff has the right to such change of venue in the state court, not where it is discretionary with the state court whether to allow the change of venue or not.[60]

The statute seems to draw a distinction between prejudice and local influence, and to allow removal for either of these two causes.[61]

It does not mean that the petitioner must prove, as an actual fact, that he cannot obtain justice. Such a requirement would practically make the law a dead letter. He need only prove the existence of such prejudice or local influence, not that the court or jury was actually affected by it.[62]

[57] City of Detroit v. Railroad Co. (C. C.) 54 Fed. 1; Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

[58] Pennsylvania Co. v. Bender, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. Ed. 441.

[59] Dennison v. Brown (C. C.) 38 Fed. 535; Amy v. Manning (C. C.) 38 Fed. 868.

[60] Robison v. Hardy (C. C.) 38 Fed. 49; Rike v. Floyd (C. C.) 42 Fed. 247; Smith v. Lumber Co. (C. C.) 46 Fed. 819; Crosby Lumber Co. v. Smith, 51 Fed. 63, 2 C. C. A. 97; City of Tacoma v. Wright (C. C.) 84 Fed. 836.

[61] Neale v. Foster (C. C.) 31 Fed. 53.

[62] City of Tacoma v. Wright (C. C.) 84 Fed. 836.

Proof that a decision in favor of the petitioner would affect the judge's chances of re-election has been held sufficient, and it applies whether the case is triable by a judge or a jury.[63]

The existence of such prejudice or local influence is enough to justify the removal, whether such feeling was, as a matter of fact, justified, under the circumstances, or not.[64]

REMOVAL BECAUSE OF STATE DENIAL OF EQUAL CIVIL RIGHTS.

123. The denial of civil rights by state legislative authority gives the right of removal to the party so injured.

Section 641 of the Revised Statutes [65] provides as follows: "When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending * * *."

The primary object of this provision was the protection of

[63] City of Detroit v. Railroad Co. (C. C.) 54 Fed. 1; Montgomery County v. Cochran (C. C.) 116 Fed. 985.

[64] Bartlett v. Gates (C. C.) 117 Fed. 362.

[65] U. S. Comp. St. 1901, p. 520.

the colored race in the civil rights conferred upon them as a consequence of the Civil War. In its language, however, it is ample to cover any deprivation of equal civil rights, and is by no means limited to the colored race. The main rights which it is intended to cover, however, are those rights conferred by the fourteenth amendment, and the acts of Congress passed in pursuance thereof. The right to authorize removal from a state court by virtue of this statute is within the constitutional power of Congress.[66]

The essential principle to bear in mind under this section is that it alludes to state legislation, not to the mere practice or administration by state officers of state laws which show no intent to discriminate upon their face. This has been repeatedly decided by the Supreme Court.

Strauder v. West Virginia[67] was a criminal prosecution against a colored man, removed by him under this act because the West Virginia statute provided upon its face that only white persons should be summoned as jurors. The court upheld the right of removal.

On the other hand, Virginia v. Rives[68] was a prosecution in a Virginia state court against a negro for murder. The Virginia laws regulating the summoning of jurors did not contain any provision limiting them to the white race, but it was charged that the uniform practice of the state officers was to summon only white men upon the jury. The Supreme Court denied the right of removal in such case, because the discrimination was not by the state in its legislation, but by the officers of the state in their practice under it.

If the state legislation charged to bring about the discrimination is in form a dead letter, then the right of removal does not exist. In Neal v. Delaware[69] the Delaware Constitution of 1831, limiting the summoning of jurors to white persons,

[66] Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664.
[67] 100 U. S. 303, 25 L. Ed. 664.
[68] 100 U. S. 313, 25 L. Ed. 667.
[69] 103 U. S. 370, 26 L. Ed. 567.

was still in force, but the Delaware courts had held that the amendments to the federal Constitution adopted after the war practically amended their state Constitution, also, although there had never been a state convention formally amending it. The Supreme Court held in such case that the right of removal did not exist.

In Bush v. Kentucky [70] the state act which attempted to discriminate in the summoning of jurors had been held by such court to be unconstitutional, but had never been formally repealed. The Supreme Court held that a petition to remove as to acts after the decision of the state supreme court holding the law invalid could not be sustained.

Under this principle that the right is given only against state legislation, and not against the mere administration of the state law, there is no ground of removal under this act from the fact, even if proved, that there exists a personal or class prejudice against the obnoxious race. Such a case is not provided for where the parties are citizens of the same state.[71]

The fact that the state is suing in its own courts does not create any such inequality or denial of equal protection of its laws as to authorize the right of removal under this act.[72]

The case of People of New York v. Bennett [73] reviews the decisions on this subject. It held that the New York Statute of 1895 against bookmaking and pool selling in connection with horse racing did not constitute a denial of the equal protection of the laws, from the fact that it made things offenses if committed at one place, when they would not be if committed at another.

[70] 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354.

[71] Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Texas v. Gaines, Fed. Cas. No. 13,847.

[72] Alabama v. Wolffe (C. C.) 18 Fed. 836.

[73] (C. C.) 113 Fed. 515.

REMOVAL OF SUITS AGAINST OFFICERS OR PERSONS ENFORCING THE INTERNAL REVENUE LAWS.

124. Suits in state courts, whether civil or criminal, against officers or others acting under federal authority in enforcing the revenue laws, are removable by them.

The first part of section 643 of the Revised Statutes [74] provides as follows: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court."

The object of this statute is to protect federal officers in performing their duties under the revenue laws against suits in state courts, civil or criminal, on account of acts done while acting in that capacity. This provision is constitutional.[75]

It applies to suits commenced in a state court. When the proceeding is a criminal proceeding in which an indictment is necessary, it is not supposed to be commenced until an indictment has been found by the grand jury of the state. A preliminary examination before a magistrate under such circumstances cannot be removed, because it may be that, when sent on to the grand jury, an indictment would not be found, and

[74] U. S. Comp. St. 1901, p. 521.

[75] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

it could not have been the intent of Congress to place on the federal grand juries the burden of finding indictments under state laws.[76]

There are, however, many cases which can be commenced without any indictment at all. For instance, under the criminal laws of Virginia, magistrates have original jurisdiction of a large class of misdemeanors, and try them as a court of original jurisdiction, not as a mere examining court. A prosecution of this sort against a federal officer for acts contemplated by the section above quoted is removable, though the magistrate's court may not be a court of record.[77]

The prosecutions removable from the state court are for acts as an officer of the United States in administering the revenue laws.[78]

It includes not only regular officers like marshals or deputy marshals, but soldiers of the army detailed to assist, or men summoned as a posse for the same purpose.[79]

It includes not only criminal prosecutions, but civil suits against federal officers to hold them liable for their acts as such in connection with the revenue laws. For instance, a suit is removable from the state court which sought to recover back taxes from a collector of internal revenue on the ground that they had been illegally assessed by him.[80]

It includes an action by a railroad company against a collector of customs for freight collected by his deputy from the consignees of goods passing through the customhouse, and in such case the federal court has jurisdiction to decide whether the collector is liable for the acts of his deputy under such circumstances.[81]

[76] Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

[77] Virginia v. Bingham (C. C.) 88 Fed. 561.

[78] Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

[79] Virginia v. De Hart (C. C.) 119 Fed. 626; Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574.

[80] Venable v. Richards, 105 U. S. 636, 26 L. Ed. 1196.

[81] Cleveland, C., C. & I. R. Co. v. McClung, 119 U. S. 454, 7 Sup. Ct. 262, 30 L. Ed. 465.

The better opinion is that suits in connection with those portions of the postal laws which look to the raising of revenue are removable. This would not include suits in connection with the money-order system, as that was not intended by Congress to be a means of raising revenue, but as a mere convenience.[82]

The suits in connection with those parts of the postal laws relating to the raising of revenue under them are removable.[83]

And a suit in a state court against contractors charged with the duty of building a government post office, and in connection with other acts as such contractors, is removable.[84]

The statute, however, does not authorize the removal of a suit against a United States commissioner to recover fees illegally exacted by him.[85]

Nor prosecutions in a state court for violation of the state liquor laws, even though the accused may hold a federal liquor license. A license of this sort is not a license to violate state laws.[86]

The removal under this act is effectual when the federal court, by the process more fully set out in the statute, notifies the state court of the fact of removal.[87]

The effect of removing such a case is rather anomalous. The federal court then tries the action as a prosecution under the laws of the state, and therefore it follows the construction of the state law by the state court. If it is a prosecution in a state court for murder, then the question what constitutes murder or homicide is to be settled by the law of the state against whose sovereignty the act, if an offense at all, is an offense.[88]

[82] U. S. v. Norton, 91 U. S. 566, 23 L. Ed. 454.

[83] Warner v. Fowler, Fed. Cas. No. 17,182; U. S. v. Bromley, 12 How. 88, 13 L. Ed. 905.

[84] Ward v. Construction Co., 99 Fed. 598, 39 C. C. A. 669.

[85] Benchley v. Gilbert, Fed. Cas. No. 1,291.

[86] Com. v. Casey, 12 Allen (Mass.) 214.

[87] Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

[88] North Carolina v. Gosnell (C. C.) 74 Fed. 734.

In such case the prosecution in the federal court is conducted by the state prosecuting officers, and the federal prosecuting officers, if they take part at all, defend the accused, as he is setting up a defense under the federal law.[88]

[88] Delaware v. Emerson (C. C.) 8 Fed. 411.

CHAPTER XV.

THE CIRCUIT COURT (Continued)—JURISDICTION BY REMOVAL (Continued).

125. Steps to Secure and Effect Removal—In General.
126. Form of Petition in General.
127. Place to File Petition.
128. Proper Averments in the Petition.
129. The Removal Bond.
130. Time of Filing Petition.

STEPS TO SECURE AND EFFECT REMOVAL—IN GENERAL.

125. The method of removing a cause is to file a petition in the state court showing on its face a removable case, accompanied by a proper bond. An order should then be obtained from the state court accepting the bond. A transcript of the record must be filed afterwards in the federal court. The refusal of the state court to enter such order does not defeat the right of removal.

The first part of section 3 of the act of August 13, 1888,[1] provides as follows:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond,

[1] U. S. Comp. St. 1901, p. 510.

with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

Under this provision the only method of removal is by petition, and the necessity for filing a petition is jurisdictional. The case cannot be removed by consent, nor can a petition be waived by consent.[2]

FORM OF PETITION IN GENERAL.

126. The petition must allege all necessary jurisdictional facts, and such facts must be alleged as existing both at the date of commencing the suit in the state court and at the date of filing the petition. A petition which does not make this allegation as to both these dates is defective.[3]

There is some conflict of authority on the question whether the petition must aver the necessary facts positively, or whether an averment on information and belief is sufficient.

In Wolff v. Archibald [4] it was decided that the averment of jurisdictional facts must be positive. On the other hand, in Carlisle v. Sunset Telephone & Telegraph Co.,[5] it was held

[2] Hegler v. Faulkner, 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. Ed. 210; First Nat. Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51.

[3] Mattingly v. Railroad Co., 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894; Dalton v. Insurance Co. (C. C.) 118 Fed. 936.

[4] (C. C.) 14 Fed. 369. [5] (C. C.) 116 Fed. 896.

that as the petitioner could not, in the nature of things, know the necessary facts positively of his own knowledge, an averment on information and belief was sufficient. This latter view seems to the author the more reasonable and correct one.

The petition need not be under oath except in those cases where the statute expressly requires it. The cases in which it does require it are when the ground of removal is prejudice or local influence, in which there must, under the express requirements of the statute, be some proof to the court of the existence of the necessary facts, and an affidavit to the petition is one way of showing this; and an affidavit is necessary in cases removed on the ground of the denial of equal civil rights, and in cases of the removal of suits and prosecutions against revenue officers.

Signature by Counsel.

The petition need not be signed by the petitioner himself, but may be signed by his counsel.[6]

How far Record may Supplement Defective Petition.

It has been stated above that the petition must show all the necessary jurisdictional facts. As a matter of good pleading, this should always be done, independent of the remainder of the record, as the court should be entitled to have the petitioner's case clearly, logically, and consecutively presented in a single paper without being put to the trouble of searching through the entire record. At the same time it is the result of the decisions that, though the petition itself may be defective even in jurisdictional facts, yet if those facts appear from other parts of the record the case is removable. This important qualification must be borne in mind in the future discussion as to the necessary averments to insert in a petition.

In Reed v. Hardeman Co.[7] the petition averred that the

[6] Dennis v. Alachua Co., Fed. Cas. No. 3,791; Removal Cases, 100 U. S. 457, 25 L. Ed. 593.

[7] 77 Tex. 165, 13 S. W. 1024.

amount involved was over $500, but the declaration showed that it was over $25,000. The court held that the case was removable under the act of August 13, 1888, though the averment of the petition itself did not show the necessary jurisdictional amount.

In National S. S. Co. v. Tugman [8] a petition was defective in not showing the alienage of one of the parties; but other parts of the record showed it, and the court held that the case was removable.

How far Petition Amendable.

This must be considered, first, as to the power of the state court to allow an amendment before the order of removal is entered, and, second, as to the power of the federal court after the transcript has been filed in the latter court.

As to the state courts, an amendment can certainly be allowed at any time before the lapse of the time prescribed by law within which the petition must be filed.[9]

It has also been held that the state court can allow the amendment of a petition even after the time within which the petition must be filed.[10]

On principle, there is no reason why a state court cannot allow an amendment at any time before it has entered the order of removal. If the case is a removable case, and the defect is merely in stating such facts, the party ought not to be deprived of his statutory right to remove by the omission of a statement of fact which existed at the time the petition was filed, although not set out in the petition.

As to the right to amend in the federal courts, the decisions of the lower courts to the effect that such right cannot be allowed as to the allegation of jurisdictional facts are numerous,

[8] 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. See, also, Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657; Powers v. Railway Co., 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673.

[9] Hardwick v. Kean, 95 Ky. 563, 26 S. W. 589; Security Co. v. Pratt, 65 Conn. 161, 32 Atl. 396.

[10] Roberts v. Navigation Co. (C. C.) 104 Fed. 577.

and quite recent. For instance, even as late as the case of Dalton v. Germania Ins. Co.,[11] where the only defect was the failure to allege the conditions as to citizenship as of the time of beginning the suit, as well as of the time of the petition for removal, it was held that such an amendment could not be made.

Decisions to this effect are too numerous to cite, but they may be considered as overruled by the recent case of Kinney v. Columbia Savings & Loan Ass'n,[12] decided November 9, 1903. In that case there was an allegation that it was a controversy between citizens of different states, following the language of the statute, but the allegation omitted to state the existence of the necessary facts both at the time of commencing the suit and at the time of the petition for removal. The state court had removed the case without objection, and the circuit court had allowed an amendment. The Supreme Court, reviewing the previous decisions, held that such an amendment could be allowed under those circumstances, and that the amendment could insert jurisdictional facts where they actually existed.

On principle, the solution of this question ought to be that if the petition is defective, and if the state court (which has the right under the decisions to say whether the petition does make out a removable case) refuses to remove it, then, as such refusal on the part of the state court is right, the case never legally reaches the circuit court. Therefore, the proper course would be to amend in the state court under such circumstances. If, however, no amendment is made in the state court, or application therefor is refused, then the circuit court, never having obtained legal jurisdiction of the case, has no jurisdiction to allow an amendment; but, if the state court actually orders the removal, then, the case having reached the circuit court rightfully, the latter court ought to have the right to allow an amendment as to jurisdictional matters.

[11] (C. C.) 118 Fed. 936.

[12] KINNEY v. ASSOCIATION, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103.

PLACE TO FILE PETITION.

127. Under the express provisions of the statute the petition for removal ought to be filed in the state court in the following cases:

(a) When the ground is the existence of a federal question.

(b) When the application is to remove the entire suit under section 2 of the act of August 13, 1888, which includes:

(1) Suits by the United States.

(2) Suits depending on the citizenship of the parties; and

(3) Suits depending on the existence of claims under conflicting land grants of different states.

(c) Where the ground of removal is that a separable controversy is involved.

(d) Where the ground of removal is denial of equal civil rights.

On the other hand, the petition for removal must be filed in the United States circuit court when the ground is the existence of prejudice or local influence, or when it is a suit or prosecution against revenue officers.

PROPER AVERMENTS IN THE PETITION.

128. Any petition for removal under any one of the various classes of removal cases must show in its averments all the necessary facts to entitle the petitioner to a removal on the particular ground relied on.

When the Ground is the Existence of a Federal Question.

In order to ascertain the proper allegations in such a petition, it is necessary to compare the first section of the act of August 13, 1888, regulating the original jurisdiction of the court, with the second section, regulating its jurisdiction by removal. When this comparison is made, it will be seen that the petition ought to show the character of the suit, so as to show that it is a suit of a civil nature, at law or in equity, of which the court would have original jurisdiction, thus excluding proceedings by mandamus and other proceedings which, as shown in a

previous connection, cannot be brought originally in the federal courts. The petition then ought to show that the suit arises under the "Constitution and laws of the United States, or treaties made or which shall be made under their authority." Prior to the act of August 13, 1888, it was essential to show this by the petition, at least in those cases where it did not appear on the plaintiff's pleading, for under the prior acts a suit could be removed, as involving such a question, where the question was raised for the first time by the defendant's pleading; but it has been seen that under the present act the plaintiff's own pleading must show the existence of a federal question upon its face before the case is removable at all. Hence, while it is better pleading, and due the court, to state not merely in general terms that the case arises under the Constitution and laws of the United States, or treaties made or which shall be made under their authority, but also to state exactly what the question is and how it arises, still a failure to do this would not be fatal, because it would necessarily appear on the plaintiff's own pleading, and hence would come under the principle above described, that the petition may be supplemented by other parts of the record.

The petition should conclude with the prayer for removal, and have the bond attached.

Averments Necessary When the Application is to Remove the Entire Controversy on the Ground of Citizenship, etc.

In this class of cases the form of the petition is necessarily more important, for it is the petition which shows that the case is a removable case, and not the other parts of the record. In an ordinary case in a state court it is no part of any system of pleading to set out the citizenship of the parties. Hence the record in this case must be supplemented by proper averments in the petition itself, and the pleader cannot ordinarily hope to fall back upon the other parts of the record to help him out, as he usually can when a federal question is involved.

The first section of the act of August 13, 1888, regulating jurisdiction, and the second section, regulating removals, must

be read together in order to see the necessary averments. Reading them together, it will be seen that the petition ought to show the character of the suit, whether at law or in equity, and that it is one of which the circuit court would have original jurisdiction. It ought to show the amount involved, and the citizenship of each of the parties at the time of the commencement of the suit and at the time of filing the petition. In addition, as only the nonresident defendant can remove, it ought to show the residence or habitation of each party, both plaintiff and defendant; and, if it is a suit by the assignee, it ought to show the same as to the assignor. But where these facts appear in other parts of the record, in such case an omission to allege these facts would be supplemented by the record. But still the petition ought to collate all these facts for the convenience of the court.

It is not sufficient to allege merely that the plaintiffs and defendants are citizens of different states, but the citizenship of each one must be given.[13]

Same—Corporations.

These are the general principles regulating the drafting of the petition. There are, however, many instances where general allegations are tantamount to the allegations stated to be necessary above. Most of these questions arise in connection with the proper averments as to the legal status of corporations. The general principles discussed in reference to the proper allegations in original suits [14] apply to such circumstances.

In the case of an alien corporation, for instance, an allegation that the corporation is organized under the laws of a certain foreign country is, in law, equivalent to the allegation that this was the state of facts both at the commencement of the suit and the filing of the petition for removal, for it speaks of the date of creation.[15]

[13] Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132.

[14] Ante, p. 214 et seq.

[15] Roberts v. Navigation Co. (C. C.) 104 Fed. 577; Continental Wall-Paper Co. v. Lewis Voight & Sons Co. (C. C.) 106 Fed. 550.

The principle that a corporation must not be alleged to be a citizen, and that such an allegation is meaningless, applies as well to removal cases as to original cases.[16]

An allegation that the corporation is organized under the laws of a certain state, and has its principal office at a certain place in said state, is a sufficient allegation both of citizenship and residence,[17] though, for safety's sake, an allegation that such was the state of facts both at the commencement of the suit and the filing of the petition would be a wise addition.

In some cases it has been held that, in making the proper allegations as to a corporation, it should be stated not only that it is a citizen of a given state, with its principal office in that state, but also that it is not a citizen of the state where the suit is pending. The reason given for this decision is that a corporation may be a citizen of more than one state, and that this possibility ought to be excluded.[18]

On the other hand, it has also been held that an allegation that it is a corporation of a certain state, with its principal office in that state, is sufficient.[19]

It seems to the author that this latter class of authorities is best based on reason. A careful study of the Supreme Court decisions in relation to corporations holding charters or permissive legislation from more than one state will show that a corporation cannot be a citizen of two states. On the contrary, those cases have held that where a corporation is chartered even simultaneously by two states, and keeps but one set of books, one set of officers, and one organization, still, in contemplation of law, they are two entirely distinct and separate corporations. Hence an averment that a corporation was organized under the laws of a certain state, with its principal office in that state, would be tantamount to the averment that it was the corpora-

[16] Dinet v. Delavan (C. C.) 117 Fed. 978.

[17] Ante, p. 216.

[18] Overman Wheel Co. v. Manufacturing Co. (C. C.) 46 Fed. 577.

[19] Myers v. Murray, Nelson & Co. (C. C.) 43 Fed. 695, 11 L. R. A. 216; Shattuck v. Insurance Co., 58 Fed. 609, 7 C. C. A. 386.

tion which was bringing the suit, and this ought to be sufficient.[20] If this were not true, certainly an allegation to the above effect ought to be sufficient to make a prima facie case, and to put on any party who should question it the onus of denying it.

Averment of Residence.

As to a corporation, an averment that it is organized under the laws of a certain state, with its principal office in that state, is equivalent to an averment of residence in that state.[21]

In reference to such an averment as among individuals, it was held in Fife v. Whittell [22] that, as only a nonresident defendant could remove, there must be an express averment in the petition that the defendant is a nonresident, even though there is already an express averment that the defendant is a citizen and resident of a certain state, different from the one where the suit was instituted.

On the other hand, in Zebert v. Hunt [23] it was held that an allegation of citizenship and residence in another state was sufficient to show nonresidence. To the author it seems that it certainly ought to be sufficient. If a suit is brought in the Eastern District of Virginia, and the petition alleges that the defendant is a citizen and resident of the state of New York, it would seem to be hypercritical in the extreme to require him to go on and allege further that he was not a resident of the state of Virginia. Something, at least, might be left for the court to presume.

Allegations Necessary in Removals on the Ground of Separable Controversies.

As the plaintiff's own petition must show that the plaintiff's controversy is separable, this allegation is not essential, but should be inserted for the reasons given in previous connections. Hence the petition in such case ought to show the character of

[20] Nashua & L. Corp. v. Corporation, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363.

[21] Howard v. Gold Reefs (C. C.) 102 Fed. 657.

[22] (C. C.) 102 Fed. 537. [23] (C. C.) 108 Fed. 449.

suit, the amount, the citizenship of the parties to the controversy, alleged in accordance with the rules given in the last connection, and sufficient to show that the defendant is a nonresident defendant. Of course, as in all other cases, there should be a prayer for removal and a proper bond.

Allegations When the Ground is Prejudice or Local Influence.

This petition, as shown above, goes to the United States circuit court. As there is no record in that court to help out the petition, it must be prepared with special care. It must show the character of the suit, the amount involved, the citizenship and residence of both parties as detailed above, and the facts which are claimed to show the existence of prejudice or local influence. A mere allegation that such prejudice or local influence exists would not be sufficient, but the petition should set out wherein the prejudice or local influence is supposed to exist. It is a delicate matter for a judge to remove a suit from another court on such a ground, and the petitioner must expect that the first impulse of the federal judge in such case will be a negative, and must make his strongest allegations to meet it. It should be accompanied by affidavits or other proof sufficient to make such a case appear to the court.

Removal on Ground of Denial of Civil Rights.

In this case the amount and citizenship are immaterial. The petition under such circumstances should show the character of the suit or prosecution, show the right denied, and state the facts constituting the denial, and here an affidavit is necessary.

Removal on the Ground of Prosecution of Revenue Officers.

The petition in this case must be filed in the federal court, and, as there is no record in this court at the time of its filing, it must necessarily be very full. It must show the nature of the suit or prosecution, and have a certificate of an attorney or counselor who appears in the court when the suit or prosecution is commenced, or in the United States court, stating that, as counsel for the petitioner, he has examined the proceedings, and carefully inquired into all the matters set forth in the

petition, and believes them to be true. This, too, is one of the cases in which the petition must be verified by affidavit.

THE REMOVAL BOND.

129. In order to effect a removal, the petitioner is required to file a bond, with proper surety, to insure the transfer on his part of the record in the case to the proper federal court at the proper time, and to cover all costs incident to the removal of the case.

The statute requires, in reference to the main sources of jurisdiction by removal, that with the petition the petitioner shall file a bond, "with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."

This bond is not an ordinary court bond, and is not used in the usual sense of a writing obligatory.[24]

In the Removal Cases [25] the Supreme Court approved a bond not under seal and signed with the plaintiff's name by his attorneys. A defect in a bond is not jurisdictional, but the court may allow it to be amended, or a new one to be substituted.[26]

It will be observed that the statute does not name any fixed amount as a penalty. There is some difference of opinion among the courts whether a bond should name a penalty or not. It would seem to be the correct practice to name a penalty, but the penalty named should be sufficiently large to cover all possi-

[24] Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Loop v. Winter (C. C.) 115 Fed. 362; People's Bank v. Insurance (C. C.) 53 Fed. 161.

[25] 100 U. S. 457, 25 L. Ed. 593.

[26] Overman Wheel Co. v. Manufacturing Co. (C. C.) 46 Fed. 577; Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093.

ble costs in the event of a remand; and, if it is, the better opinion is that the bond would be in proper form.[27]

TIME OF FILING PETITION.

130. The petition for removal must be filed at or before the time when the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to first answer or plead to the declaration or complaint of the plaintiff. But the question of the time of filing the petition is not one of jurisdiction, but merely modal or formal, and may be waived.

In the cases covered by the second section of the act of August 13, 1888, except removals on the ground of prejudice or local influence, the statute requires that the defendant may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff. This is quite a departure from the policy of the former acts, which allowed a longer time within which to file the petition. At the same time, the question of the time of filing the petition is not one of jurisdiction, but is, as has been said more than once, merely modal and formal. Hence it is a requirement which may be waived either by direct consent or by conduct. The plaintiff who wishes to contend that the petition has not been filed in time must act promptly. If he goes to trial on the merits, or contests the right of removal on other grounds, he waives this right.[28]

[27] Commonwealth v. Bridge Co. (C. C.) 42 Fed. 241; Johnson v. Manufacturing Co. (C. C.) 76 Fed. 616.

[28] Guarantee Co. v. Hanway, 104 Fed. 369, 44 C. C. A. 312; Martin v. Railway Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963.

Nor can this question be raised for the first time in an appellate court.[29]

The question when the petition should be filed depends upon the statutes and practice of the different states. But the petition must be filed when the defendant is required to put in any defense to the complaint, whether of a dilatory character or to the merits. If, under the practice of the state court, dilatory pleas must be filed at an earlier date than pleas to the merits, then the defendant must file his petition at the time when the dilatory plea is due.[30]

Rule in Case of Extension of Time.

The question whether an extension of time within which the defendant shall answer extends the time for filing the petition is one in which the decisions are in great conflict. In the New York circuit it is held that such an extension does extend the time for filing the petition.[31]

There is, however, highly respectable authority the other way.[32]

The decisions in the different districts on this point are necessarily largely governed by the practice of the states in which the decisions are rendered. The case of Martin v. Baltimore & O. Ry. Co., above cited, seems to establish that the petition must be filed before any judgment of default, even conditional in its nature, is entered against the defendant. Hence, on principle, the proper doctrine appears to be that if, at the time the extension is granted, no judgment by default has been entered against the defendant, and if the effect of the extension is that no judgment by default can be entered until the period of extension expires, then the defendant can file his petition

[29] Knight v. Railway Co., 61 Fed. 87, 9 C. C. A. 376; Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129.

[30] MARTIN v. RAILWAY CO., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311.

[31] Lord v. Railroad Co. (C. C.) 104 Fed. 929; Dancel v. Machinery Co. (C. C.) 106 Fed. 551.

[32] Fox v. Railway Co. (C. C.) 80 Fed. 945.

during such extension. But if a judgment by default has to be set aside in order to grant the extension, it would be too late.

In Chiatovich v. Hanchett [33] the court held that an extension by stipulation of parties, without any court order, extended the time for filing the petition. This apparently is going too far, as the question is determined, under the language of the statute, not by special interchanges of courtesies among counsel, or by orders in special cases, but by the general laws or rules of the state court. No better test can be laid down as to the general provision than the language of the statute itself. If, under the state practice, the defendant is required, first, whether there is any extension or not, to plead to the declaration or complaint, whether that plea be dilatory or peremptory, then he must file his petition when such plea is due. If the effect of the extension under the state practice is under the general rules of practice of that state, and not under special agreement of counsel, to extend the time within which he is first required to plead any sort of plea on pain of a default judgment, whether conditional or absolute, then the effect of the extension would be to extend the right of filing the petition. This seems to the author the meaning of the statute.

It has well been held that a party who is not served with process, and only appeared on condition that he should answer within a certain length of time, could file his petition during that time, even though it extended the period beyond the time when he would have had to make defense, had he been served.[34]

If the service is void, the time does not run from such service, and the petition may be filed even after a judgment by default, for the judgment by default is void itself if the service is void.[35]

In proceedings against a nonresident on attachment and by publication, many state Codes provide that the defendant may

[33] (C. C.) 78 Fed. 193.
[34] Tracy v. Morel (C. C.) 88 Fed. 801.
[35] Tortat v. Manufacturing Co. (C. C.) 111 Fed. 426.

appear within a given time, if he has not been served with process, set aside the judgment, and defend the case.

Under the act of 1875, which required the petition to be filed before the first term at which the case could be tried, the Supreme Court held that a nonresident defendant who appeared after the term and set aside the default could file his petition.[36]

The principle of this decision applies to proceedings under the present act. A proceeding by attachment, not accompanied with personal service, is void, except as regards the property attached; being in the nature of an action in rem. This being the case, the defendant is not in court personally on such proceeding, and when he comes into court he comes with all of the rights which he would have had in an ordinary personal suit.

Removals on Amended Declaration or Complaint.

It frequently happens that the original complaint of the plaintiff does not show a removable case, as when it makes parties who would defeat the jurisdiction. Subsequent thereto the plaintiff, by dismissing his suit as to some of the defendants, or by filing an amended petition showing on its face some ground of removal, changes the character of the case. There was for a time considerable conflict among the authorities whether a change of this sort would give the right to remove a case on an amended petition, when it did not first exist. It had been held that, where the amendment raised the amount involved to the jurisdictional amount, then a petition to remove could be filed within the time when the petitioner was first required to answer the amended petition.[37]

A recent decision of the Supreme Court, however, has put the matter at rest, and held that, where the amended petition made a removable case which did not exist before, the right of removal could be exercised within the time required to plead to the amended petition.[38]

[36] Harter Tp. v. Kernochan, 103 U. S. 562, 26 L. Ed. 411.

[37] Huskins v. Railroad Co. (C. C.) 37 Fed. 504, 3 L. R. A. 545.

[38] Powers v. Railway Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471.

This principle, however, only applies where the petition itself or the voluntary act of the plaintiff shows a removable case. A decision by the court dismissing the case as to one of the two defendants on the merits does not result in allowing the other defendant to remove.[39]

Removals in Vacation of State Court.

Interesting and conflicting questions of practice arise when the petition is filed during the vacation of the state court. For instance, under the Virginia practice the time when the defendant is first required to plead is at a rule day, and while the case is "at rules," as it is usually designated. The rules are kept by the clerk, and the judge has no control over proceedings at rules until the case goes on the trial docket. Under this practice, the petition must be filed at rules—that is, in the clerk's office, before the clerk—and the judges ordinarily refuse to enter any order, because they contend that, under the state practice, they have no power while the case is at rules. At the same time, a case cannot well be removed until the court, as a court, has an opportunity to pass upon the question whether the petition makes a removable case, and whether the bond is sufficient. Under these circumstances, the proper practice is to file the petition at rules, and at the next term of the court to bring it to the attention of the court, and ask the removal order to be entered.[40]

If, however, the state judge has power to act at rules or in vacation, this removes the case, without any further order in court.[41]

Time of Filing Petition in Removals on Ground of Prejudice or Local Influence.

In removals on the ground of prejudice or local influence, the statute requires that the petition, which in this case is

[39] Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303.

[40] Monroe v. Williamson (C. C.) 81 Fed. 977; Hall v. Agricultural Works (C. C.) 48 Fed. 599; Fox v. Railway Co. (C. C.) 80 Fed. 945.

[41] Mecke v. Mineral Co., 93 Fed. 697, 35 C. C. A. 151.

filed in the United States circuit court, shall be filed "at any time before the trial thereof." This means the first trial, and consequently the application would be too late after a mistrial.[42]

In removals on the ground of denial of civil rights, the petition must be filed in the state court "at any time before the trial or final hearing of the cause," and in suits against revenue officers it must be filed "at any time before the trial or final hearing thereof." In these cases, under the meaning given these words in previous acts, the petition could be filed even after a mistrial, because that would still be before the trial or final hearing.[43]

In these two latter cases it must be filed before the trial is commenced. In Yulee v. Vose [44] it was held that the trial had not commenced, even though the jury was sworn, and that a petition filed after the jury was sworn was in time.

[42] Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; McDonnell v. Jordan, 178 U. S. 229, 20 Sup. Ct. 886, 44 L. Ed. 1048.

[43] Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. Ed. 68; Baltimore & O. R. Co. v. Bates, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436.

[44] 99 U. S. 539, 25 L. Ed. 855.

CHAPTER XVI.

THE CIRCUIT COURT (Continued)—JURISDICTION BY REMOVAL (Continued)—ORIGINAL JURISDICTION OF THE SUPREME COURT—OTHER MINOR COURTS OF ORIGINAL JURISDICTION.

131. Steps at Filing of Petition.
132. Filing and Subsequent Procedure in Federal Court.
133. Motion to Remand.
134. The Supreme Court as a Court of Original Jurisdiction.
135. Various Other Courts of Original Jurisdiction.

STEPS AT FILING OF PETITION.

131. When the petition is to be filed in the state court, the procedure is simply to take the petition and bond and present it to the judge, if it is a case where it must be filed in open court, or file it in the clerk's office, where that is the proper place. If presented to the judge, he ought to be requested to sign an order of removal. If filed in the clerk's office, the judge ought to be requested at the next term to sign such an order. Notice of such action is not required by the statute, and the cases which say that notice should be given do not say that it is essential, but merely that it is the proper way.[1]

Where the removal is on the ground of prejudice or local influence, the petition, as has been seen, is filed in the federal court, and it must be made to appear to that court that this ground of removal exists. There is a stronger reason in this case for requiring notice,[2] but even here the statute does not expressly require it.

When the petition is presented to the state court, it has the right to consider and pass upon the question whether the peti-

[1] Creagh v. Insurance Co. (C. C.) 83 Fed. 849; Ashe v. Insurance Co. (C. C.) 115 Fed. 234.

[2] Schwenck v. Strang, 59 Fed. 209, 8 C. C. A. 92.

tion upon its face shows a removable case. It has not, however, the right to try any question of fact bearing on the question of jurisdiction, for it is, under the express language of the statute, the duty of the court to accept the petition and bond and proceed no further in the suit, and the federal court alone can try the questions of jurisdiction depending on the facts, and not appearing on the face of the petition.[3]

While it is made the duty of the state court to accept the petition and bond, and that it should enter an order doing so, its failure to enter such an order does not defeat the right of removal, but the petitioner can take his transcript of the record and file it, and the federal court will attain jurisdiction of the case.[4]

If the state court enters an order denying the removal, the petitioner can reserve an exception, and still remove his case to the federal court; and his remaining in the state court after such reservation of his right is not a waiver of his right of removal.[5]

In such case the petitioner may take an exception to the refusal of the state court, and then remain in the state court, fight the case out, and appeal to the Supreme Court direct from the court of last resort of the state, under section 709 of the Revised Statutes, giving such right of appeal.[6]

Or he may remain in the state court, fight the case there, and also take the case to the federal court and fight it there at the same time, and such action will not be a waiver of his rights.[7]

[3] STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Powers v. Railway Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

[4] Loop v. Winter (C. C.) 115 Fed. 362.

[5] Kirby v. Railway Co. (C. C.) 106 Fed. 551.

[6] STONE v. SOUTH CAROLINA, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

[7] Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354; CHESAPEAKE & O. RY. CO. v. WHITE, 111 U. S. 134, 4 Sup. Ct. 353, 28 L. Ed. 378; Hickman v. Railroad Co. (C. C.) 97 Fed. 113.

FILING AND SUBSEQUENT PROCEDURE IN FEDERAL COURT.

132. The act requires a transcript of the record to be filed in the circuit court in the district where the suit is pending, and on the first day of its then next session. This means the federal court of the district which includes territorially the state court where the suit is pending at the time of removal. The place where the suit originated does not affect the question.[8] The jurisdiction of the federal court vests as of the time of filing the petition in the state court.

If the removal is to the wrong federal court, this mistake is a jurisdictional one, and the court does not acquire cognizance of the case.[9]

The jurisdiction of the federal court attaches as of the date of filing the petition in the state court. Even during the interval between the filing of the petition in the state court and the transcript of the record in the federal court, the latter has jurisdiction, and will make any orders necessary for the preservation of the property, etc.[10]

There is some difference in the decisions on the question whether the federal court during this interval has sufficient jurisdiction to preserve the property and enter preliminary orders, or whether it has jurisdiction over the whole case. The rational view on this question is that taken by Judge Severens in Torrent v. S. K. Martin Lumber Co.[11] In it he says that there is no intermediate state during which neither court has jurisdiction, but that the federal court has full jurisdiction over the subject; that, in the exercise of its jurisdiction, it must regard the established rules and practice, but that questions as to hearing the case too soon, or matters of that sort, are questions of procedure, and not of jurisdiction.

[8] Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927.
[9] Ex parte State Ins. Co., 18 Wall. 417, 21 L. Ed. 904.
[10] Texas & St. L. R. Co. v. Rust (C. C.) 17 Fed. 275.
[11] (C. C.) 37 Fed. 727.

The petition must be filed in the federal court "on the first day of its then next session." There seems to be a dearth of decisions on the question what is meant in the statute by the word "sessions." However, the word in the Revised Statutes relating to the federal courts is used interchangeably with "terms," and it must mean that the removal must be to the next term. The short sessions of the courts held by adjournments without notice and irregularly could hardly have been in contemplation of Congress. The fourth chapter of title 13 is headed, "District Courts, Sessions," and yet all the provisions of that chapter allude to the terms of the district court. The eighth chapter of title 13 is headed, "Circuit Courts, Sessions," and yet all the provisions allude to terms. This is clear, also, from the language of section 7 of the act of March 3, 1875. Hence the transcript of the record should be filed on the first day of the next term, subject to the provisions of section 7, above recited, allowing a period of twenty days in any event.

No formal order of the federal court placing the case on the docket is required. It need simply be filed, and, though it is filed before the first day of the term, it takes effect as of the first day, if on file at that time.[12]

Further Pleadings.

Although, as Judge Severens says, there is no intermediate state between the two courts, as far as jurisdiction is concerned, and the jurisdiction of the federal court attaches as soon as the petition is filed in the state court, there is an intermediate state of the case in one respect, and that is in reference to the pleadings. As soon as the petition is filed in the state court, that court can proceed no further. Hence, if the record was filed in the clerk's office, if at rules, no rules can be taken upon it, nor can any default be entered after the filing of such petition. On the other hand, until the filing of the transcript of the record in the federal court, it is impossible to take any

[12] Glover v. Shepperd (C. C.) 15 Fed. 833.

rules or enter any orders of default in that court, for the case is not there for the purpose. Hence, as far as maturing the case to issue is concerned, there is, if not an intermediate state, at least a period of suspended animation, during which the case remains in statu quo. As soon as filed in the federal court, then the case revives, and the pleadings must be made up.

A failure to file the record on the first day of the federal court will not defeat the right of removal, as the delay is not a jurisdictional defect. In fact, if the state court wrongfully refuses to remove the case, and the petitioner saves his exception, and does not file his record in the federal court, but fights the case through even to the Supreme Court of the United States on the question of his right of removal, and wins, he can, after such successful contest, still file his record in the federal court.[18]

Place of Removal When Court Sits in Different Localities.

It is the case in many districts that the court meets at different points, and it then becomes a nice question where the record should be filed. In the Eastern District of Virginia, for illustration, there is but one district court for the whole district, and there are no laws requiring cases in certain portions of the territory of that district to be brought at certain points. The court meets at three places—Richmond, Norfolk, and Alexandria—but it is one court, and has but one clerk, and its jurisdiction extends over the entire district. Under the language of the act, which requires the record to be filed in the circuit court "on the first day of its then next session," it would seem very clear that, no matter where the case originated, it ought to be filed at the next term of the circuit court. For instance, although Norfolk is one of the places of sitting of the circuit court, a suit pending in the state court at Norfolk ought to be removed, and the record filed at Richmond, if that

[18] Baltimore & O. Ry. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643: National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. Ed. 87.

is the next place in the district where the court meets. But an order of transfer may afterwards be obtained to the most convenient place of session.

In the case of Cobb v. Globe Mut. Life Ins. Co.,[14] the judge remarks, in passing, that the record ought to be filed at the place of session most convenient to the state court where it is pending. An examination of the case will show that this was a dictum, as the record had not been filed in time for any term of the circuit court; and, while this may be a good rule of convenience, there is nothing in the statute to justify it.

In the case of Lucker v. Phœnix Assur. Co.,[15] Circuit Judge Simonton held that the proper place to file the record was where the court was next to sit, although he went on to say that as the filing in a certain court was not a question of jurisdiction, but convenience, and the court had the discretionary power to allow a record to be filed even after the time, he would allow the record in this case to be filed at the most convenient point. Strangely enough, he refers to this decision of Cobb v. Globe Mut. Life Ins. Co. as an analogous case; but the difference between the place where the record ought to be filed, and the power of the judge to excuse its being filed elsewhere, is a very obvious one.

In Pierce v. Corrigan[16] it was held that the proper place was the next place of session of the court, whether that was the most convenient point or not, but that where the mistake was bona fide the court would not remand the case on that account.

When the record is filed too late, the court has a legal discretion whether to remand or not.[17]

It may happen that the defendant, after filing his petition in the state court, will purposely not file it in the federal court. In order to prevent any injustice under these circumstances,

[14] Fed. Cas. No. 2,921.

[15] (C. C.) 66 Fed. 161.

[16] (C. C.) 77 Fed. 657.

[17] Kidder v. Featteau (C. C.) 2 Fed. 616; St. Paul & C. R. Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703.

it has been held that the plaintiff himself may file the record in the federal court, and then move to remand if he desires.[18]

Power of Federal Court after Removal.

The third section of the act of August 13, 1888, expressly provides that the case thereupon proceeds in the same manner as if it had originally been commenced in the circuit court. However, the federal court only attains the jurisdiction which the state court had, and hence any point can be made in the federal court that could have been made in the state court.[19]

The petitioner after removal may even make points questioning the jurisdiction of the case on the ground of improper service of process, or other points for which a special appearance would have to be entered, for it is well settled that the filing of the petition for removal is not a general appearance. The reason of this is that the object of removing a case is to give the federal court jurisdiction to try any questions that can arise in the case, as it is necessary for the protection of the nonresident defendant that the federal court may pass upon all questions involved.

In Goldey v. Morning News [20] the petition for removal stated upon its face that it was intended only as a special appearance, and the court held that when so worded it had only that effect.

But in the case of Wabash W. Ry. Co. v. Brow [21] the petition was in the ordinary form, and did not purport on its face to be a special appearance. The court held in this case, also, that it was, in law, only a special appearance, and was not a waiver of the right to raise any defects even in the service of process.

[18] Anderson v. Appleton (C. C.) 32 Fed. 855.

[19] East Tennessee, V. & G. R. Co. v. Telephone Co., 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746.

[20] 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

[21] WABASH W. RY. CO. v. BROW, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. See, also, Corbitt v. Bank (C. C.) 114 Fed. 602.

MOTION TO REMAND.

133. The proper way for the party who opposes the removal to question the jurisdiction of the court is by a motion made in the federal court to remand the case to the state court. On this motion in the federal court he can try both questions of law and fact, but the allegations of the petition are prima facie to be taken as true.[22] The decision of the circuit court remanding the case is not appealable.

It is expressly provided in the act that, if the federal court remands the case, there can be no appeal from this decision; and this means that there cannot only be no direct process to review the decision by appeal or writ of error, but that it cannot be questioned by any other process, like mandamus. The decision of the circuit court on the subject is final and conclusive.[23]

Nor can the remanding of the case by the circuit court be questioned by writ of error to the state court after the state court has resumed jurisdiction.

In Missouri Pac. Ry. Co. v. Fitzgerald,[24] the state court had first entered an order removing the case, and then the circuit court had remanded it. The case thereupon proceeded in the state court, and the party who had originally petitioned for its removal took out a writ of error to the state court from the Supreme Court on the ground that he was denied a federal right. The Supreme Court held that his denial of this right was not by the state court, but by the circuit court, and that its acts could not be reviewed in this indirect way.

The decision of Cole v. Garland,[25] if not in conflict with this decision, can only be sustained on the ground that it was

[22] Loop v. Winter (C. C.) 115 Fed. 362.

[23] Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Powers v. Railway Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

[24] 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536.

[25] 107 Fed. 759, 46 C. C. A. 626.

an attempt to appeal from the state court in a case where there was a denial of a civil right, which is governed by a different statute from the general removal act.

The refusal of the circuit court to remand a case can be made the subject of exception, and can be taken up after a final decree in the case. It is, however, not a final decree.[26]

After a case is remanded to the state court, its jurisdiction revests, and the case proceeds there just as it would have done in the first instance.[27]

THE SUPREME COURT AS A COURT OF ORIGINAL JURISDICTION.

134. The Supreme Court of the United States exercises original jurisdiction in cases affecting ambassadors, public ministers, and consuls, and civil cases involving controversies where a state is a party, comprehending controversies:

(a) Between states—Jurisdiction exclusive.
(b) Between the United States and a state.
(c) Between a state and its citizens.
(d) Between a state and citizens of another or other states.
(e) Between a state and an alien or aliens.

The third article of the federal Constitution expressly requires that there shall be one Supreme Court, and this is the only court established by the Constitution itself. The second section of the same article defines the federal judicial power, and, among others, names cases affecting ambassadors, other public ministers, and consuls, controversies between two or more states, and controversies between a state and citizens of another state.

The same section further provides that in all cases affecting ambassadors, other public ministers, and consuls, and those

[26] Edrington v. Jefferson, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. Ed. 594; Bender v. Pennsylvania Co., 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537.

[27] Birdseye v. Shaeffer (C. C.) 37 Fed. 821.

in which a state shall be a party, the Supreme Court shall have original jurisdiction. This provision giving original jurisdiction to the Supreme Court direct does not, however, prevent Congress from conferring concurrent jurisdiction even in those cases on other federal courts, if it sees fit.[28]

Acting under this grant, Congress, by section 687 of the Revised Statutes,[29] has provided as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against embassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by embassadors, or other public ministers, or in which a consul or vice-consul is a party."

Controversies Where a State is a Party.

It will be observed that the statute limits these cases to controversies of a civil nature. This was in pursuance of the decisions rendered under the constitutional grant, which had held that the intent of the Constitution was simply to confer upon the federal courts jurisdiction of that sort. It could not have been the intent of the framers of the Constitution to give the federal court jurisdiction of criminal proceedings in a state court.[30]

Proceedings for penalties, or even a suit by a state on a judgment recovered under a statute creating a penalty, are not within the grant.[31]

[28] Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482.

[29] U. S. Comp. St. 1901, p. 565.

[30] Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257.

[31] WISCONSIN v. INSURANCE CO., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

Nor was it the intent to give jurisdiction, merely because a state happens to be named as a party, over such cases as were not properly cognizable by courts of justice—as, for instance, mere political questions.[32]

Controversies where a state is a party may be considered under the several following heads:

1. Controversies between states.
2. Controversies between the United States and states.
3. Controversies between a state and its own citizens.
4. Controversies between a state and citizens of other states.
5. Controversies between states and aliens.

Controversies between States.

In this case the jurisdiction of the Supreme Court is exclusive, it being thought that it was the only tribunal of sufficient dignity to justify bringing sovereign states before it. The states alluded to are states of the Union.[33]

And it means states as a unit, not mere political subdivisions of states, like counties.[34]

Same—Boundary Disputes.

This is the most common instance in which jurisdiction has been exercised by the Supreme Court, and the cases under this subject are quite numerous. In such case the Supreme Court uses the forms of equity proceedings, and frames its own pleadings and process in each case. An interesting case on the subject is Rhode Island v. Massachusetts.[35]

Same—Other Instances.

There are many other disputes between states, however, which come within the purview of this act. For instance, a

[32] State of Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721.

[33] Texas v. White, 7 Wall. 700, 19 L. Ed. 227.

[34] Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766.

[35] 12 Pet. 657, 9 L. Ed. 1233; 13 Pet. 23, 10 L. Ed. 41; 14 Pet. 210, 10 L. Ed. 423; 15 Pet. 233, 10 L. Ed. 721.

suit by Missouri against Illinois to prevent a political subdivision of the latter state from emptying into the Mississippi river, by a drainage canal, the sewerage of the city of Chicago, was held within the jurisdiction of the court.[36]

This provision, however, cannot be used in such a manner as to allow a state having no interest itself to merely permit the use of its name to its citizens for the purpose of collecting debts—as, for instance, suits by a state for the benefit of its citizens against another state on the bonds of the latter.[37]

But where the state is the actual owner of the bonds. and those bonds are secured by stock pledged by way of mortgage or collateral, the Supreme Court has jurisdiction of a suit by such state, as owner, at least to the extent of foreclosing its mortgage, although the bonds were merely given to the state, and although the motive of the donors was to enable the state to test their validity by such suit.[38]

On the other hand, a suit by a state against another state to prevent the use by the latter state of its quarantine laws in such a way as to affect the commerce of citizens of the plaintiff state cannot be sustained, since the state, as a state, would have no interest in such a suit, but it would really be for the benefit of its citizens alone.[39]

Controversies between the United States and a State.

The Supreme Court has jurisdiction of such controversies.[40]

Controversies between a State and Its Own Citizens.

This does not give jurisdiction of a suit by the citizens against the state, for a state is a sovereign power, and cannot be sued without its consent.[41]

[36] MISSOURI v. ILLINOIS, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

[37] New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656.

[38] SOUTH DAKOTA v. NORTH CAROLINA, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448.

[39] Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

[40] U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285.

[41] Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842

Nor can jurisdiction be sustained in a suit by a state against defendants some of whom are its own citizens and some citizens of other states, for that does not fall within either of the classifications of judicial power named in the second section of article 3 of the Constitution. It is not a controversy between a state and its own citizens, nor a controversy between a state and citizens of another state.[42]

Controversies between a State and Citizens of Another State.

Soon after the adoption of the federal Constitution, the Supreme Court decided in Chisholm v. Georgia,[43] that this constitutional grant enabled a citizen of another state to sue the state in the Supreme Court. The uproar created by this decision is well known in our political history, and resulted in the adoption of the eleventh amendment to the Constitution, which expressly forbade such suits, so that a state cannot now be made a defendant at the suit of a citizen of another state.[44]

Controversies between a State and Aliens.

The same principle would prevent an alien from suing a state as defendant, and it is perfectly clear that a suit between aliens and a private citizen would not come under this classification.[45]

Proceedings Against Ambassadors.

These suits only lie in cases where such parties can be sued under the general principles of international law; and the provision does not apply to a citizen of the United States, though he may be a consul general of a foreign power, when he is

[42] California v. Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683.

[43] 2 Dall. 419, 1 L. Ed. 440.

[44] Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805.

[45] Ex parte Barry, 2 How. 65, 11 L. Ed. 181.

merely acting temporarily in the absence of the regular diplomatic representative.[46]

VARIOUS OTHER COURTS OF ORIGINAL JURISDICTION.

135. Besides the courts heretofore discussed, there are many important federal courts vested with original jurisdiction, but not of general interest to the practitioner, and therefore beyond the purview of this treatise. Such are the court of claims, the court of private land claims, the courts of original jurisdiction of the District of Columbia, and the territorial courts.

[46] In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222.

CHAPTER XVII.

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION—COURTS OF LAW.

136. Distinction between Law and Equity.
137. Procedure in Courts of Law.
138. Same—Process.
139. Same—Attachments.
140. Same—Appearances.
141. Same—Parties to Common-Law Actions.
142. Same—Pleading.
143. Same—Continuances.
144. Same—Trial.
145. Same—Same—Evidence.
146. Same—Same—Instructions to Jury.
147. Same—Same—Bill of Exceptions.
148. Same—Same—Verdict.
149. Same—Motion for New Trial.
150. Same—Motion in Arrest of Judgment.
151. Same—Judgment.
152. Same—Execution.

DISTINCTION BETWEEN LAW AND EQUITY.

136. The distinction between law and equity in the federal courts in all matters of procedure is most carefully preserved and guarded, for it is a distinction made by the Constitution itself. Hence the federal courts preserve this distinction, and are not affected by the reform procedure adopted in many of the state courts abolishing it.

Equitable Titles.

For this reason equitable titles or suits of an equitable nature cannot be sustained on the common-law side of the federal court, nor can a state statute prescribing a remedy at law for

a cause of action essentially equitable in its nature apply to the federal courts.[1]

On the same principle, although the federal courts will follow the state courts in their rules as to the joinder of causes of action, provided the causes of action are all legal in their nature, they will not allow the joinder of legal and equitable causes of action in one suit.[2]

Equitable Defenses.

So, too, equitable defenses cannot be set up in the federal courts in actions at law. For instance, they cannot take cognizance of a plea of equitable set-off;[3] nor of an equitable title in defense to an action of ejectment.[4] But many defenses equitable in nature may be proved by way of counterclaim under a plea of the general issue or payment, if growing out of the same transaction; that being allowable under the later common-law decisions.[5]

Nor can a reply to a plea be made which sets up an equitable ground as a means of defeating the defense made by the plea; as, for instance, where the defendant pleaded a release, the plaintiff cannot reply that the release was obtained by fraud and misrepresentation, though the state practice allowed it.[6]

[1] Fenn v. Holme, 21 How. 481, 16 L. Ed. 198; Lindsay v. Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; Jewett Car Co. v. Construction Co. (C. C.) 107 Fed. 622.

[2] SCOTT v. NEELY, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Jones v. Fidelity Co. (C. C.) 123 Fed. 506.

[3] Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Connolly v. Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

[4] Schoolfield v. Rhodes, 82 Fed. 153, 27 C. C. A. 95.

[5] DUSHANE v. BENEDICT, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810.

[6] Hill v. Railroad Co., 113 Fed. 914, 51 C. C. A. 544.

PROCEDURE IN COURTS OF LAW.

137. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty cases in the circuit and district courts of the United States, conform as nearly as practicable to those existing in like causes in the courts of record of the state within which the circuit or district courts are held, except that the federal courts are given power within prescribed limits to make rules for the regulation of the details of their own practice, provided, however, the substance and general methods of procedure in the state courts are observed.

The subject of procedure is regulated by chapter 18 of title 13 of the Revised Statutes.[7] In so far as this applies to the common-law courts, the most important provision is section 5 of the act of June 1, 1872, embodied in section 914 of the Revised Statutes,[8] which reads as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This act must also be construed in connection with section 918 of the Revised Statutes,[9] which reads:

"The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and other-

[7] U. S. Comp. St. 1901, p. 680. [8] U. S. Comp. St. 1901, p. 684.
[9] U. S. Comp. St. 1901, p. 685.

wise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Under these two sections it is well settled, speaking in general, that the federal courts are not bound to adopt the state practice in all its details, but that they have a discretion in conforming only "as near as may be," and in regulating by rule details which would not change the substance and general methods of procedure of the state practice.[10]

SAME—PROCESS.

138. The federal courts adopt the general forms of process of the state courts on the common-law side, subject, however, to their own regulations. But the federal law requires that their process shall be under the seal of the court, and signed by the clerk, and that those issuing from the Supreme Court or circuit court shall bear teste of the chief justice or associate justice next in precedence when the chief justiceship is vacant; and those issuing from the district court shall bear teste of the district judge; or, when that office is vacant, of the clerk.

Defective process may be amended, but no amendment can make a void process valid.

The federal courts adopt the general forms of process of the state courts on the common-law side, subject, however, to their own regulations. Sections 911 and 912, however, are obligatory on process of the federal courts. They require that the process shall be under the seal of the court, and signed by the clerk, and that those issuing from the Supreme Court or circuit court shall bear teste of the chief justice or associate justice next in precedence when the chief justiceship is vacant; and

[10] SHEPARD v. ADAMS, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602; Osborne v. Detroit (C. C.) 28 Fed. 385; Ewing v. Burnham (C. C.) 74 Fed. 384.

those issuing from the district court shall bear teste of the district judge, or, when that office is vacant, of the clerk. Hence, under this provision, no process can be used in the federal courts which does not issue from the court, and is not in conformity with the provisions of these sections. This excludes the procedure by motion to recover money common in some states, when the notice of motion is simply signed by the attorneys and served on the attorneys. A motion to recover money, when authorized by state practice, can be used in the federal courts; but in such case the notice of the motion which is served on the defendant must be signed, not by the attorneys, but by the clerk, and must be under the seal of the court. In that form the procedure is correct, and not at all uncommon.[11]

Except as to the method of signature, however, the form of the process in the state courts on the common-law side can be used in the federal courts.[12]

Amendments.

Process issuing from the federal courts may be amended under the provisions of section 948 of the Revised Statutes,[13] which enacts:

"Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

This only allows, however, an amendment of a defective process. If the defect is so serious as to make it absolutely void, and no process at all, then it cannot be amended; as where it is neither signed nor sealed.[14]

[11] Dwight v. Merritt (C. C.) 4 Fed. 614; Peaslee v. Haberstro, Fed. Cas. No. 10,884.

[12] Gillum v. Stewart (C. C.) 112 Fed. 30.

[13] U. S. Comp. St. 1901, p. 695.

[14] Dwight v. Merritt (C. C.) 4 Fed. 614.

Service.

The service of process is as provided by the state statute.[15] But in the case of foreign corporations this is subject to the proviso that the corporation must be doing business within the jurisdiction, before process can be served on it. If it is not carrying on business there, service cannot be made upon one of its officers merely because he resides there.[16]

SAME—ATTACHMENTS.

139. The state attachment laws in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes, except as against a nonresident not personally served in the district.

Section 915 of the Revised Statutes[17] provides as follows: "In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

But, as seen in a previous connection, the federal courts cannot issue an attachment against a nonresident when he is not

[15] Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

[16] BARROW S. S. CO. v. KANE, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Cady v. Associated Colonies (C. C.) 119 Fed. 420.

[17] U. S. Comp. St. 1901, p. 684.

found in the district, or when there is no other ground of jurisdiction.[18]

It is clear from the language of the above section that this adopted simply the attachment laws which were in force on June 1, 1872, and that subsequent attachment laws of the states are not adopted unless the court specially provides therefor by general rule; but under this statute and section 914, the general state practice in relation to attachments is adopted.[19]

SAME—APPEARANCES.

140. As to the effect of the defendant's appearance the federal courts are not bound to follow state statutes prescribing a certain result as flowing from the entry of an appearance; as, for instance, state statutes which provide that a special appearance shall have the effect of a general appearance.

As the practice only conforms "as near as may be," the federal courts have a discretion to disregard this provision of the state court.[20]

SAME—PARTIES TO COMMON-LAW ACTIONS.

141. The rules as to parties to actions are substantially similar to those prevailing in the state courts of the locality, subject to certain exceptions incident to the nature of the federal courts and the character of their jurisdiction.

State statutes allowing parties in real interest to sue in their own names are adopted by the federal courts, subject, always,

[18] EX PARTE DES MOINES & M. RY. CO., 103 U. S. 794, 26 L. Ed. 461; Central Trust Co. v. Railroad Co. (C. C.) 68 Fed. 685.

[19] Logan v. Goodwin, 104 Fed. 490, 43 C. C. A. 658; Commonwealth Trust Co. v. Frick (C. C.) 120 Fed. 688.

[20] Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699.

to the proviso that, if the real interest which they attempt to assert is an equitable interest, they cannot sue in the federal courts in their own names; for, as seen above, equitable titles cannot be asserted in the federal courts on the law side.[21]

But an assignee can sue in his own name where the state statute allows it and vests him with the legal title.[22]

Where a state statute allows a wife to sue in her own name for damages to person or character, the federal statute allows her also.[23]

Where there is an improper joinder of parties, and the state statute allows the improper parties to be stricken out, the same practice will be followed by the federal courts.[24]

SAME—PLEADING.

142. The pleading in the federal courts is substantially similar to that in the state courts of the locality.

Amendments are liberally allowed in case of formal defects in a way to enable the courts to administer justice and render decisions according to the very right of the cause.

The forms of action in the state courts on the common-law side are adopted by the federal courts. In fact, this was the prime object of the passage of the act of June 1, 1872, so as to save the bar the necessity of having to learn and practice two entirely different systems of pleading.[25]

[21] New York Continental Jewall Filtration Co. v. Sullivan (C. C.) 111 Fed. 179.

[22] Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; Nederland Life Ins. Co. v. Hall, 84 Fed. 278, 27 C. C. A. 390.

[23] Morning Journal Ass'n v. Smith, 56 Fed. 141, 4 C. C. A. 8.

[24] Perry v. Insurance Co. (C. C.) 11 Fed. 478; Whitaker v. Pope, Fed. Cas. No. 17,528.

[25] INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898.

Hence the state rule as to the effect of a general issue, and what is provable under it, is adopted by the federal courts.[26]

Amendments.

The federal courts are liberal in the allowance of amendments. Section 954 of the Revised Statutes [27] provides:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

It not only acts under this section in liberally allowing amendments, but it also adopts the practice of the state courts in the allowance of amendments in so far as that practice does not conflict with the rights given by the above section. For instance, where the state practice allows it, a new count can be added to the declaration.[28]

So, too, where a foreign administrator sues in the federal courts without having had a local qualification, he can qualify after the institution of the suit, and then amend, setting up his local qualification.[29]

[26] Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; DUSHANE v. BENEDICT, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; Burley v. Bank, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406.

[27] U. S. Comp. St. 1901, p. 696.

[28] WEST v. SMITH, 101 U. S. 263, 25 L. Ed. 809.

[29] Hodges v. Kimball, 91 Fed. 845, 34 C. C. A. 103.

A widow who sues as administrator can amend by bringing the suit in her own right.[30]

An amendment of the declaration may be made during the trial in order to avoid a variance.[31]

Under section 954 an amendment can be made in the federal courts even after judgment, and in as vital a matter as the allegation of citizenship.[32]

In fact, whatever the state practice may be as to amendments, it cannot restrict the right of the federal courts under section 954, but that section governs in case of conflict or difference of practice.[33]

SAME—CONTINUANCES.

143. In the matter of continuances the federal courts follow their own rules, and are not affected by the state law or practice, as continuances are not considered to come within the purview of section 914.[34]

The granting or refusing of a continuance in a federal court is a matter of discretion with the judge.[35]

SAME—TRIAL.

144. The making up of the jury in the federal courts is largely under the court's control, and it may adopt the state practice or not, as it thinks fit.[36]

The federal courts have their own procedure in reference to the question of trying cases without a jury. The trial may be without a jury when the jury is waived in writing.

[30] Van Doren v. Railroad Co., 93 Fed. 260, 35 C. C. A. 282.

[31] Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317.

[32] Mexican Cent. Ry. Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715.

[33] Lange v. Railroad Co. (C. C. A.) 126 Fed. 338.

[34] Texas & P. R. Co. v. Nelsón, 50 Fed. 814, 1 C. C. A. 688.

[35] Fidelity & Deposit Co. v. Lumber Co., 189 U. S. 135, 23 Sup. Ct. 582, 47 L. Ed. 744.

[36] Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

Section 649 of the Revised Statutes [37] provides:

"Issues of fact in civil cases in any circuit court may be tried, and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And section 700 of the Revised Statutes [38] provides:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

These provisions in terms apply to the circuit court only, so that in common-law trials in the district court it is a matter of doubt whether a jury can be waived.[39]

It is not a matter of doubt, however, that the provisions of these statutes must be rigidly followed. It is not sufficient for the record simply to state that a jury was waived, but it must appear either by recitals in the record or by the filing of the paper that there was filed a stipulation in writing waiving a jury. Before the act was passed which is now embodied in section 649, the court had decided that, where the parties submitted the whole case to the judge, he acted not as judge, but practically as arbitrator, and there could be no review of his decision.[40]

On similar reasoning, if the waiver is not in accordance with

[37] U. S. Comp. St. 1901, p. 525.
[38] U. S. Comp. St. 1901, p. 570.
[39] Howard v. Crompton, Fed. Cas. No. 6,758.
[40] Campbell v. Bayneau, 21 How. 223, 16 L. Ed. 96.

the statute, the same principle would apply, and parties who are not particular about this may find, when they try to reach the appellate court, that they have unconsciously submitted their case to arbitration, and that the court of appeals will not review the decision of the judge sitting without a jury, unless the record clearly shows that there was a stipulation in writing waiving a jury.[41]

And even where there is such a stipulation the appellate court can only consider such errors as are excepted to at the time.[42]

In respect to this the federal courts are not affected by state statutes. As the trial must be by jury unless waived, a state statute allowing a reference of a common-law case to auditors or referees will not be followed by the federal courts.[43]

SAME—SAME—EVIDENCE.

145. The evidence in the federal courts is taken in a manner similar to that prevailing in the state courts, except that the federal courts have certain rules of their own relating to the taking of depositions.

In common-law cases it is provided by section 861 of the Revised Statutes[44] that the mode of proof in the trial of an action at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided. The cases "hereinafter provided" are those sections providing for the taking of depositions de bene esse, or the issuing of commissions.

An important statute in reference to the taking of depositions is the act of March 9, 1892.[45] It provides:

"That in addition to the mode of taking the depositions of

[41] BOND v. DUSTIN, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835.

[42] McCREA v. PARSONS, 112 Fed. 917, 50 C. C. A. 612; Wilson v. Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113.

[43] Sulzer v. Watson (C. C.) 39 Fed. 414.

[44] U. S. Comp. St. 1901, p. 661.

[45] U. S. Comp. St. 1901, p. 664.

witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

There is some conflict of decision on the subject as to the scope of this act. In the New York circuit it has been held that this act authorizes the adoption of state statutes allowing the examination of the parties to the cause before the actual trial.[46]

On the other hand, the preponderance of authority, and the better authority, is that this statute was simply intended to cover the method of taking the deposition, and not to give any right to compel taking depositions under a state statute, which did not exist before, so that state statutes permitting the examination of parties before the trial are not applicable to the federal courts. These decisions certainly seem to accord best with the language of the act.[47] And the recent decision of the Supreme Court in Hanks Dental Ass'n v. International Tooth Crown Co.[48] settles this as the law.

Where, however, a state statute authorizes a surgical examination, the federal courts will act under it; but the right to do this is based upon section 721, adopting the laws of the states as rules of decision in trials at common law, and is not based upon the theory that such a statute is at all a statute relating to evidence.[49]

[46] International Tooth-Crown Co. v. Association (C. C.) 101 Fed. 306, overruled Hanks Dental Ass'n v. International Tooth-Crown Co., 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989.

[47] Despeaux v. Railroad Co. (C. C.) 81 Fed. 897; National Cash Register Co. v. Leland (C. C.) 77 Fed. 242.

[48] 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989.

[49] Camden & S. R. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721.

SAME—SAME—INSTRUCTIONS TO JURY.

146. In instructing a jury the federal courts are not bound by the state practice, but follow their own rules, regardless of state legislation to the contrary.

A federal judge has full power to charge a jury.

A federal judge may direct a verdict where the facts are undisputed, or the preponderance of evidence is so strong that reasonable men should not differ as to the deductions to be drawn from it; and this may be done at the close of the plaintiff's evidence or at the close of the whole evidence, and in exceptional cases at the close of the opening statement.

In their manner of instructing or charging the jury the federal courts have blazed out their own path, and are not at all governed by the state practice or statutes on the subject. Even a requirement of a state Constitution forbidding any charges to the jury as to matters of fact does not affect the federal courts;[50] nor does any other state practice or statute on the subject.[51]

Perhaps the most radical difference between the practice of the state courts and the federal court is along this line. In many state courts (especially in Virginia) the powers of the judge are restricted, so that he becomes hardly more than the moderator at a meeting. He cannot express the slightest opinion on questions of evidence, and in many states cannot give any instruction or charge to the jury unless it be reduced to writing. This is not the practice of the federal courts, and it has been repeatedly decided that section 914, adopting the state practice, does not apply to this question. The judges in the federal courts have the right to comment on the evidence, and to discuss even its weight and credibility, provided

[50] St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161.

[51] CITY OF LINCOLN v. POWER, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.

only they let the jury understand that the final decision on all questions of fact is with them.[52]

Motion to Direct Verdict.

It is the constant practice of the federal courts to direct a verdict. The circumstances under which they can direct it are carefully guarded, and they cannot do so when the evidence is conflicting.[53]

But where the facts are undisputed, or the preponderance is so great that the evidence practically becomes conclusive, and no reasonable men could differ as to the deductions to be drawn from it, then they can direct a verdict.[54]

In the Virginia practice, which probably is similar to that of many states, such a thing as directing a verdict is unheard of. The only method of taking advantage of the failure of the plaintiff to prove his case is by demurrer to evidence, with all its attendant risks. The practice of the federal courts attains the same object, and still leaves the party who requests a direction of a verdict free to go before the jury in case the court should refuse. If the evidence is such that the court would be bound to set aside a verdict in case one was rendered, then a federal court will save the litigants and itself the delays of a long trial, and will direct the jury to bring in a verdict.[55]

Time for Motion.

Motions to direct a verdict in the federal courts may be made at any one of several stages. If the opening statement of counsel for the plaintiff states the evidence on which he expects to rely and in so doing shows that on such evidence he cannot recover, the court may, at the close of his statement, without

[52] Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; CITY OF LINCOLN v. POWER, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Freese v. Kemplay, 118 Fed. 428, 55 C. C. A. 258.

[53] White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027, 40 L. Ed. 55.

[54] Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485.

[55] Sansom v. Railway Co., 111 Fed. 887, 50 C. C. A. 53.

going into any evidence at all, direct the jury to bring in a verdict, for the reason that it would be an idle ceremony and a great waste of time to allow a trial to proceed when it is a foregone conclusion that any verdict would have to be set aside.[56]

If, however, the defendant does not care to make this motion at that time, or if he makes it then, and fails, he can renew the motion at the end of the plaintiff's evidence. If the motion is sustained, that ends the case in his favor; if the motion is overruled, he has the choice of two methods: He may take an exception to the action of the court in overruling his motion, and submit no evidence, and go to the appellate court on the theory that the plaintiff's own evidence has failed to make out a case, and seek for a reversal on that ground. If he considers this step too dangerous, he can then put on his own evidence, but when he does so he waives the benefit of any exception that he may have taken to the action of the court in refusing to direct a verdict at the end of the plaintiff's evidence, for it may very well be that, even though the plaintiff's evidence was not sufficient to sustain a verdict, the defendant's may have supplemented it; and hence putting on evidence after the overruling of a motion to direct at the close of the plaintiff's evidence is held to be a waiver of such an exception. He can, however, give up the benefit of his assignment of error for failure to instruct at the close of the plaintiff's evidence and still renew his motion to the court to direct a verdict at the close of all the evidence in the case; and, in case this motion is overruled, he can take an exception to the action of the court and embody all the evidence in the bill of exceptions, on the theory that neither the plaintiff's nor defendant's evidence, nor both combined, are sufficient to sustain a verdict. The right to take these different steps is fully established by the authorities.[57]

[56] Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539.

[57] Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; UNION PAC. R. CO. v. CALLAGHAN, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628; Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct.

SAME—SAME—BILL OF EXCEPTIONS.

147. The bill of exceptions is the method of incorporating into the record errors of law not otherwise appearing in the record.

In the form and other procedure relating to such bills the federal courts have their own rules, and do not regard the state practice.

The bill of exceptions must be formally written out and signed by the judge, but it need not be under seal.

The exception must be noted at the time the ruling objected to is made, and the bill of exceptions perfected during the term.

The exception must be specific, and taken as to the precise point objected to, and a separate exception must be taken to each objectionable ruling.

The section of the Revised Statutes as amended in 1900, allowing bills of exception, has been set out in a previous connection.[58]

In order to constitute bills of exception, they must be formally written out and signed. Mere minutes or memoranda of notations of exceptions are not bills of exceptions in the sense of this statute.[59]

The bill must be signed by the judge who presided at the trial, but it need not be under seal.[60]

The last amendment allows another judge besides the judge who presided to sign the bill of exceptions in case of the sickness or disability of the judge who actually did preside. This, however, only applies to cases of actual disability, not to cases of mere absence from the district.[61]

34, 45 L. Ed. 113; McCREA v. PARSONS, 112 Fed. 917, 50 C. C. A. 612.

[58] Ante, p. 55.

[59] Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055, 30 L. Ed. 1117.

[60] Generes v. Campbell, 11 Wall. 193, 20 L. Ed. 110; Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163.

[61] Western Dredging & Improvement Co. v. Heldmaier, 111 Fed. 123, 49 C. C. A. 264.

In order to avail of a bill of exceptions to errors in ruling, the exception must be noted at the time the ruling is made, so as to give the judge the opportunity of correcting it if possible. If noted at that time, it may be actually written out and signed any time during the term.[62]

If an agreement is made to that effect during the term, it may even be signed after the term.[63]

The trial judge may be compelled to sign a bill of exceptions by mandamus, provided, of course, it is a proper bill.[64]

In the form and other procedure relating to bills of exception the federal courts also have their own rules of action, and do not regard the state practice.[65]

The method of taking exceptions to instructions varies greatly in the federal courts and many of the state courts. Certainly the difference between the federal practice and the practice in the state of Virginia is very great. Where the judge charges the jury, an exception will fall if it is taken to the whole charge, unless the entire charge is wrong. It is the duty of the exceptant to point out the special portions of the charge which he considers objectionable. So, too, as to instructions involving more than one proposition, he must indicate the special parts of the instruction to which he objects; otherwise his exception will fall. And he must take a separate exception to each instruction, or to each error of law involved in the instruction, and make each one the subject of a separate assignment of error.

These rules are all absolutely essential to the proper matur-

[62] HUNNICUTT v. PEYTON, 102 U. S. 333, 26 L. Ed. 113; New York & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461.

[63] Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453.

[64] EX PARTE CHATEAUGAY ORE & IRON CO., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508.

[65] EX PARTE CHATEAUGAY ORE & IRON CO., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508.

ing of a common-law case in the federal courts, if it is wished to review its proceeding in an appellate court.[66]

If a single exception is taken to the entire charge, and there is any part at all of the charge right, the exception falls.[67]

On the other hand, if a series of instructions is asked, and the court refuses them, and a bill of exceptions is taken to the action of the court in refusing them, the exception falls if any one of those instructions is wrong.[68]

SAME—SAME—VERDICT.

148. The federal courts, though not compelled to do so, conform in a general way to the practice of the state courts in relation to the form of, and rules governing, the verdict; but they are not bound by state statutes requiring the courts to submit to the jury special questions of fact, and requiring the jury to make special findings in pursuance of such submissions.

As to the mere question of form, the federal courts follow the state court practice. So, too, where the state courts allow a single verdict on several counts, the federal courts will do the same.[69]

In many of the states there are laws requiring the courts to submit to the jury special questions of fact, and requiring the jury to make special findings in pursuance of such submissions. The federal courts have always refused to be bound by these statutes, considering that the control and handling of the jury is not a matter of practice, pleading, or procedure in the sense of section 914 of the Revised Statutes, but rather as a matter

[66] THOM v. PITTARD, 62 Fed. 232, 10 C. C. A. 352; South Penn Oil Co. v. Latshaw, 111 Fed. 598, 49 C. C. A. 478.

[67] Western Assur. Co. v. Polk, 104 Fed. 649, 44 C. C. A. 104.

[68] Illinois Car & Equipment Co. v. Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

[69] BOND v. DUSTIN, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Illinois Car & Equipment Co. v. Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Glenn v. Sumner, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. Ed. 301.

affecting the personal conduct and discretion of the judge, in which they will not permit state statutes to bind them.[70]

The federal court has power to amend a verdict in matters of form, and to receive a sealed verdict, and put it in proper form, when the parties had stipulated that the jury could send in their verdict sealed during a recess.[71]

SAME—MOTION FOR NEW TRIAL.

149. The federal courts follow the usual practice of common-law courts in regard to new trials, and do not feel bound in this respect by state practice.

Section 726 of the Revised Statutes [72] provides in reference to the federal courts: "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." Here the federal courts decline to follow the state court practice, considering that the question as to granting or withholding a new trial is not a question of pleading, practice, or procedure.[73]

The granting or refusing of a new trial in the federal courts is a matter of discretion, and cannot be the subject of a bill of exceptions.[74]

There is one important qualification of the above doctrine that the federal courts do not follow the state court practice in reference to new trials. Some states have laws giving a

[70] United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898; McElwee v. Lumber Co., 69 Fed. 302, 16 C. C. A. 232.

[71] Lincoln Tp. v. Iron Co., 103 U. S. 412, 26 L. Ed. 518; Koon v. Insurance Co., 104 U. S. 106, 26 L. Ed. 670.

[72] U. S. Comp. St. 1901, p. 584.

[73] INDIANAPOLIS & ST. L. R. CO. v. HORST, 93 U. S. 291, 23 L. Ed. 898; Fishburn v. Railroad Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; Hughey v. Sullivan (C. C.) 80 Fed. 72.

[74] Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085.

new trial as an absolute matter of right in certain classes of cases, mainly involving title to real estate. Where such a law exists, the federal courts will follow it in cases pending on their common-law side, and will grant a new trial under these circumstances.[75]

SAME—MOTION IN ARREST OF JUDGMENT.

150. The practice of the federal courts in respect to motions in arrest of judgment corresponds to the general common-law doctrine.

A motion in arrest of judgment under section 954, which is the federal statute of jeofails, will not lie for a variance, nor on account of mere matters of fact, nor for mere defects of form, but only for substantial and irremediable defects in the cause of action.[76]

SAME—JUDGMENT.

151. At this point, as far as questions of practice, pleading, or procedure are concerned, section 914 of the Revised Statutes, assimilating the federal to the state practice, no longer applies; proceedings subsequent to the judgment being the dividing line.

While the federal courts will follow the state practice as to the mere form of the judgment, their control over it from that time forward is regulated by the federal decisions and statutes, and not by the state practice. They may correct the record, after the term, in mere clerical errors, but in no other way.[77]

[75] Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90.

[76] Adams v. Shirk, 104 Fed. 54, 43 C. C. A. 407; Id., 117 Fed. 801, 55 C. C. A. 25; Peden v. Bridge Co. (C. C.) 120 Fed. 523; American Bridge Co. v. Peden (C. C. A.) 129 Fed. 1004.

[77] City of Manning v. Insurance Co., 107 Fed. 52, 46 C. C. A. 144.

Under the federal practice and decisions a judgment cannot be set aside after the term during which it is rendered, even though the statute of the state may provide summary remedies by motion for the purpose of regulating judgments in its own courts.[78]

It is hard to reconcile with the authorities last cited the case of Travelers' Protective Ass'n v. Gilbert.[79] There the court held that it could adopt a state remedy by motion for the reopening of a judgment, and that, when such a right existed in the state practice, it took away from the federal courts their equitable jurisdiction for the reopening or setting aside of judgments. Both these propositions are inconsistent with the above case of Bronson v. Schulten, in which the court says that, independent of these state statutes allowing the correction of judgments by motion, the power to regulate judgments after the term in which they were rendered was an equitable power. Nothing is better settled in federal law than the doctrine that the ancient equitable jurisdiction possessed by the federal courts remains with them despite newer remedies given by state statutes. The states cannot defeat the federal jurisdiction in equity on the ground that an adequate remedy exists at law by legislation prescribing remedies at law, even though those remedies were simpler than the equitable remedy.[80]

The state law is not only inapplicable on questions as to the method of setting aside judgments by the court which rendered them, but, a fortiori, it is still less applicable to proceedings for the review of a judgment.[81]

[78] BRONSON v. SCHULTEN, 104 U. S. 410, 26 L. Ed. 997; City of Manning v. Insurance Co., 107 Fed. 52, 46 C. C. A. 144; Tubman v. Railroad Co., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946; Menge v. Warriner, 120 Fed. 816, 57 C. C. A. 432.

[79] 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

[80] Post, c. 18.

[81] West v. Cedar Co., 113 Fed. 737, 51 C. C. A. 411; Friedly v. Giddings (C. C.) 119 Fed. 438; Giddings v. Freedley (C. C. A.) 128 Fed. 355.

The recent act of August 1, 1888,[82] provides as follows:

"That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

Under this act it has been held that, in case the state where the federal court sits permits or requires its officers to docket federal judgments, a judgment of the federal courts is not a lien on lands in every county of the district, but is only a lien in the special county where the court is sitting, unless it is also docketed in the state clerk's office of the other counties.[83]

A judgment in the federal courts is not a lien on property of the debtor fraudulently conveyed by a conveyance good as beween the debtor and the fraudulent grantee, and dated previous to the judgment.[84]

The authorities bearing on the lien of federal judgments are well collated in the footnote to Blair v. Ostrander.[85]

[82] U. S. Comp. St. 1901, p. 701.

[83] Dartmouth Sav. Bank v. Bates (C. C.) 44 Fed. 546.

[84] Luhrs v. Hancock, 181 U. S. 567, 21 Sup. Ct. 726, 45 L. Ed. 1005.

[85] 47 L. R. A. 469.

SAME—EXECUTION.

152. State remedies in the nature of execution in force on June 1, 1872, and any later ones adopted by rule of court, are available in the federal courts in common-law causes.

In reference to executions, section 916 of the Revised Statutes [86] provides:

"The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Under this statute only the remedies in the state court in the nature of an execution which were in existence when that statute was passed—that is, on June 1, 1872—are available in the federal courts, unless the federal court has by rule adopted subsequent state legislation on the subject.[87]

Under section 985 of the Revised Statutes [88] executions of the federal court may run into another district of the same state. Under section 987 [89] the court has power to grant a stay of execution for certain purposes.[90]

[86] U. S. Comp. St. 1901, p. 684.

[87] Canal & C. Sts. R. Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; Lamaster v. Keeler, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. Ed. 238.

[88] U. S. Comp. St. 1901, p. 707.

[89] U. S. Comp. St. 1901, p. 708.

[90] Eaton v. Railroad Co. (C. C.) 41 Fed. 421.

Section 990 of the Revised Statutes [91] provides as follows:

"No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state." [92]

Under section 993,[93] any appraisement of goods taken on a writ of execution which is required by the state laws must be followed by the federal courts. The federal courts also have power to set aside sales under writs of execution. Mere inadequacy of price alone would not result in a resale; but where the inadequacy is so gross as to shock the conscience, and especially where unfair and questionable methods have been resorted to, the court will not hesitate to set the sale aside.[94]

The act of March 3, 1893,[95] lays down important rules in reference to the sale of property under orders of the federal court. It can, however, be best discussed in connection with the chancery procedure of the federal courts.

[91] U. S. Comp. St. 1901, p. 709.

[92] In re Bergen, 2 Hughes, 513, Fed. Cas. No. 1,338; Stroheim v. Deimel, 77 Fed. 802, 23 C. C. A. 467.

[93] U. S. Comp. St. 1901, p. 709.

[94] SCHROEDER v. YOUNG, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721.

[95] U. S. Comp. St. 1901, p. 710.

CHAPTER XVIII.

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION (Continued)—COURTS OF EQUITY.

153. General Limits of Equitable Jurisdiction.
154. The Equity Procedure in the Federal Courts—How Regulated.
155. Same—Pleading—General Requisites of the Bill.
156. Same—Same—Injunction Bills.
157. Same—Same—Judges Who May Issue Injunctions.
158. Same—Same—Injunctions to State Courts.
159. Same—The Process.
160. Same—Defaults.
161. Same—The Defense.

GENERAL LIMITS OF EQUITABLE JURISDICTION.

153. The general limits of the equitable jurisdiction of the federal courts are those that prevailed in the High Court of Chancery in England at the time of the adoption of the Constitution of the United States.

The distinction between law and equity in the federal courts is made in the Constitution itself, and naturally the jurisdiction in equity which the framers of the Constitution had in mind was that jurisdiction as it prevailed at the time when the Constitution was adopted.[1]

It is practically the jurisdiction of the High Court of Chancery in England as it then existed.[2]

Section 723 of the Revised Statutes [3] provides as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

[1] Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675.
[2] Ante, p. 194. [3] U. S. Comp. St. 1901, p. 583.

This section is declaratory of the law as it existed at the time when the federal Constitution was adopted. It is measured by the subjects over which courts of equity had jurisdiction at that time, and, as state courts can neither enlarge nor diminish the jurisdiction of the federal courts, it is not affected by the fact that under subsequent legislation a statutory remedy is given which is as good as the equitable remedy. Such legislation does not narrow the jurisdiction of the federal courts in equity.[4]

Even in the federal courts the single fact that there is a remedy at law is not sufficient to oust the courts of their equitable jurisdiction. It must be as full, adequate, and complete as the equitable remedy.[5]

But while the state statutes cannot enlarge or restrict the equitable jurisdiction of the federal courts by making a matter a case of equity cognizance which is not so under the practice of the English High Court of Chancery, the federal courts can avail of any new remedy in the nature of an equitable remedy given for the enforcement of a right which is equitable in its nature.[6]

An equity court has no jurisdiction, however, to give a direct decree against the obligors on a bond given for release of property or other purposes incidental to a chancery suit. It leaves the parties to their remedy at law.[7]

[4] Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052.

[5] Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Osborne v. Railroad Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155.

[6] Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52.

[7] Bein v. Heath, 12 How. 168, 13 L. Ed. 939; Phillips v. Gilbert, 103 U. S. 721, 25 L. Ed. 833.

THE EQUITY PROCEDURE IN THE FEDERAL COURTS—HOW REGULATED.

154. The equity procedure of the federal courts is independent of that in the state courts. The federal courts, in this branch of their jurisdiction, have their own rules and practice. These rules are in accordance with the practice in equity that prevailed at the time of adoption of the federal Constitution as modified by a code of rules laid down by the Supreme Court of the United States under authority of law, together with certain rules of the lower federal courts regulating details of their own procedure.

The rules of procedure are prescribed by the Supreme Court under authority of sections 913 and 917 of the Revised Statutes,[8] which provide as follows:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used,

[8] U. S. Comp. St. 1901, pp. 683, 684.

in suits in equity or admiralty, by the circuit and district courts."

Under authority conferred by these statutes the Supreme Court at its February term, 1822, prescribed thirty-three rules to regulate the equity practice of the federal courts of first jurisdiction.[9] Subsequent thereto, at the January term, 1842, these rules were much enlarged, and were increased in number to ninety-two.[10] They constitute a model code of procedure for courts of equity, and are worthy of the closest study.

Under section 918 the lower courts can also prescribe rules for their practice not inconsistent with the above. Of the rules prescribed by the Supreme Court in 1842 ninety-one are still in force, though some of them have been amended. Since that time three others have been added. One is in reference to giving a personal decree against the mortgagor under certain circumstances in a foreclosure suit, which was promulgated at the December term, 1863.[11] Another one (rule 93) gives the judge who took part in a decision granting or dissolving an injunction a certain discretion as to suspending or modifying an injunction during the pendency of an appeal. It was promulgated at the October term, 1878.[12] And the last was intended to prevent collusive suits by stockholders for causes of action which should be asserted in the first instance by the directors or managing officers of a corporation. It was promulgated at the October term, 1881.[13]

The right of Congress to authorize the adoption of these rules by the courts has been upheld.[14]

The courts, however, can only regulate procedure under this power; they cannot, under the guise of a rule, affect the jurisdiction of the courts.[15]

Under rule 90 the practice of the federal courts in cases not

[9] 7 Wheat. xvii. [10] 1 How. xii. [11] 1 Wall. v.
[12] 97 U. S. vii. [13] 104 U. S. ix.
[14] Wayman v. Southard, 10 Wheat. 1, 42, 6 L. Ed. 253.
[15] The St. Lawrence, 1 Black, 522, 17 L. Ed. 180; Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

covered by the rules is "the present practice of the High Court of Chancery in England." Although, as has been seen above, the question of jurisdiction in equity depends upon the English jurisdiction of the equity courts, as it was at the time of the Constitution, or the enactment of the judiciary act immediately after the adoption of the Constitution, yet, as regards questions of practice, this rule means to adopt the practice of the High Court of Chancery as it existed at the time the rules were adopted. That was in 1842.[16]

In the case of Thomson v. Wooster [17] the Supreme Court calls attention to the fact that the best exponent of the English practice is the edition of Daniel's Chancery Practice issued in the year 1837. It also recommends Smith's Chancery Practice as valuable for the same purpose. It may be added that the first edition of Story's Equity Pleading was published about this same time, and is specially valuable for use in the federal courts. A companion work to this is Curtis' Equity Precedents. The forms therein are specially valuable to the chancery practitioner in the federal courts, and have not been superseded by the many excellent form books since published with a special view to their use in the federal courts.

SAME—PLEADING—GENERAL REQUISITES OF THE BILL.

155. The ancient form of bills in equity has been much simplified in the federal equity rules by authorising the omission of formal averments and abbreviating the method of stating the cause of action. But it must show

(a) The jurisdiction of the court as a federal court.

(b) The jurisdiction of the court as an equity court.

The bill must be signed by counsel as a pledge of good faith.

[16] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; Badger v. Badger, Fed. Cas. No. 717.

[17] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

The first step in the institution of an equity suit in the federal courts is the filing of the bill.

Its general form is the subject of several of the equity rules. Any bill in equity in the federal courts must, independent of its special character, embody two essentials: First, it must show the jurisdiction of the court as a federal court; and second, it must show the jurisdiction of the court as an equity court.

Federal Jurisdiction.

The allegations necessary to show its jurisdiction as a federal court have been discussed in connection with the general jurisdiction of the federal courts, to which reference is made.[18] It must show in general the citizenship of the parties, if that is the ground of the jurisdiction; the federal question involved, if that is the ground of jurisdiction; the amount involved, if that is an essential element of jurisdiction; and the residence. The twentieth equity rule is intended to cover this point, and provides as follows:

"Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the judges of the Circuit Court of the United States for the district of ———: A. B., of ———, and a citizen of the State of ———, brings this his bill against C. D., of ———, and a citizen of the State of ———, and E. F., of ———, and a citizen of the State of ———. And thereupon your orator complains and says that,' etc."

Equity Jurisdiction.

In showing the jurisdiction of the court as an equity court, the general rules of chancery pleading and practice apply; but they are beyond the range of this treatise. It was once said that a bill in chancery contained a story thrice told. Under

[18] Ante, p. 189 et seq.

the equity rules, however, many of the allegations customary in the old English bills in chancery may be omitted, though they are still frequently inserted, apparently for no other reason than that lawyers, when they prepare bills, follow blindly the old form books.

Under equity rule 21, for instance, it is not necessary to insert the common confederacy clause averring a confederacy between the defendants to injure the plaintiff; nor the charging part intended to anticipate the defense of the defendant; nor the jurisdiction clause, alleging that the defendant is without remedy at law. The bill should, however, ask the special relief desired, and contain a prayer for general relief. Under the latter prayer any relief may be granted consistent with the facts stated, although it is not specially prayed for.[19]

Parties.

On account of the constant inconvenience experienced in the federal courts from inability to make the proper parties, it is provided by rule 22 that, in case persons appearing to be proper or necessary are not made parties, the bill must show that they are out of the jurisdiction, or cannot be joined without ousting the jurisdiction. It has been shown in a previous connection that this does not authorize a bill where the parties omitted from it are so essential that no proper decree can be made in their absence.[20]

Under rule 23 it is required that the prayer for process shall contain the names of all the defendants named in the introductory part of the bill, and, if any are under disability, that this fact shall be shown. But if the names of the parties against whom process is prayed appear not merely in the introductory part of the bill, but also in the body of it, the omission of the prayer for process is not fatal.[21]

[19] Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 930; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

[20] Ante, p. 220 et seq.

[21] Jennes v. Landes (C. C.) 84 Fed. 73.

Signature of Counsel.

Under rule 24 every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given him, and the case laid before him, there is good ground for the suit in the manner in which it is framed. This signature of counsel is intended as a pledge of good faith. A bill which does not contain it is demurrable, although an indorsement by counsel will be treated as a signature.[23]

A bill which is not signed by counsel will be ordered off the rolls, but if it is signed the court will permit it to be restored to the rolls, though in that case it is practically a new bill, and does not relate back to the time of its first filing.[23]

Impertinent Matter.

Rule 26 provides that a bill be expressed briefly and succinctly, without unnecessary recitals of documents, and without any impertinent or scandalous matter. It is an inherent power of courts of equity to protect their own records, and to guard litigants from unnecessary and irrelevant attacks. Hence a bill which is rambling and prolix may be ordered off the files. If it contains any scandalous or impertinent matter, the court will act all the more quickly; and under this rule it can in such case either act itself, or refer it to a master to report whether it is scandalous or impertinent under the circumstances.[24]

Interrogatories.

The bill may contain interrogatories to the defendant, and under the present form of the fortieth rule he must answer them; and he must answer the facts of the bill anyhow, even though special interrogatories are not propounded. If, however, the plaintiff desires to propound interrogatories, they are

[23] Dwight v. Humphreys, Fed. Cas. No. 4,216.
[23] Roach v. Hulings, Fed. Cas. No. 11,874.
[24] Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.

numbered consecutively, and the defendant is required to answer them.

These interrogatories by the plaintiff under the present practice largely obviate the necessity for a bill of discovery. This is a rule, however, which does not work both ways. A defendant cannot propound interrogatories to the plaintiff, nor can he compel the production of papers in the possession of the plaintiff by motion or subpœna duces tecum. His only remedy is by a bill of discovery.[25]

SAME—SAME—INJUNCTION BILLS.

156. Injunction proceedings are instituted by the filing of a bill followed by an order to show cause. In exceptional cases, where it is necessary to preserve the status quo, the court will issue a temporary restraining order.

The injunction bill must be sworn to.

The injunction remedy is an extraordinary one, and such relief should not be granted unless it is necessary for the protection of the plaintiff's rights.

The practice on bills praying special relief, like injunction bills, is carefully regulated by the federal statutes and rules. A bill for an injunction should always be sworn to, though this is not necessary in ordinary bills. When filed, the proper practice is to issue a rule to show cause why the injunction should not be granted, and name a day for the hearing of such a rule. The remedy by injunction is an extraordinary remedy, and in theory such relief should not be granted unless it is necessary for the protection of the plaintiff's rights. It should never be granted merely because it will do no harm.[26]

Notice of preliminary injunctions is expressly required by equity rule 55, which reads as follows:

[25] Ryder v. Bateman (C. C.) 93 Fed. 31.

[26] Ladd v. Oxnard (C. C.) 75 Fed. 703; American Cereal Co. v. Cereal Co., 76 Fed. 372, 22 C. C. A. 236; Teller v. U. S., 113 Fed. 463, 51 C. C. A. 297.

"Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."

And this notice is necessarily implied by section 718 of the United States Revised Statutes,[27] which reads as follows:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

When the effect of issuing a rule to show cause without any preventive process would be that it would leave the defendant free to change the status quo, the court, in its discretion, may issue a temporary restraining order. The sole purpose of this order, however, in contemplation of the statutes regulating the subject, is to preserve the status quo. It is necessarily ex parte in its nature, and can be made an instrument of great oppression; for by such an order the defendant is often compelled to take action going beyond the mere preservation of the status quo. It is practically condemning him unheard.[28]

[27] U. S. Comp. St. 1901, p. 580. See, also, Mowrey v. Railroad Co., Fed. Cas. No. 9,891.

[28] Fanshawe v. Tracy, Fed. Cas. No. 4,643; Walworth v. Cook

Thus the theory as to the issuing of injunctions in the federal courts is very simple, and thoroughly settled both by the statutes and decisions. It is, in the first place, the filing of the bill and the issuing of an order to show cause; in the next place, the issuing of a temporary restraining order in the exceptional cases where that order is necessary to preserve the status quo. It must be confessed, however, that the practice of the courts does not always accord with the theory. It is not at all uncommon to turn the temporary restraining order into an order that is in all respects the equivalent of an ex parte injunction order. It is often the case that the courts issue the rule to show cause returnable months ahead, and issue meanwhile what they call their temporary restraining order, giving the defendant, however, the right to move to dissolve on certain notice. Thus the good nature of judges and pertinacity of counsel often change the established practice, and not always with the effect of furthering the ends of justice.

SAME—SAME—JUDGES WHO MAY ISSUE INJUNCTIONS.

157. Injunctions may be issued by Supreme Court justices or circuit or district judges, subject to certain restrictions prescribed by statute as to locality and duration.

Section 719 of the Revised Statutes [29] provides what judges may issue injunctions. It is as follows:

"Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the

Co., Fed. Cas. No. 17,136; Cohen v. Delavina (C. C.) 104 Fed. 946; Miller v. Association (C. C.) 109 Fed. 278; North American Land & Timber Co. v. Watkins, 109 Fed. 101, 48 C. C. A. 254; Barstow v. Becket (C. C.) 110 Fed. 826.

[29] U. S. Comp. St. 1901, p. 581.

circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court."

Under this the Supreme Court judges issue injunctions only in exceptional cases.[80]

The qualification contained in the latter part of the statute as to injunctions issued by a district judge must be carefully borne in mind. It is well settled, however, that only those injunctions issued by the district judge in vacation fall at the beginning of the next term. If they are issued during a regular session of the circuit court, over which the district judge presides, and not in vacation, they have just the same force as if a circuit court judge happened to be holding the court; for the power of the district judge to hold the circuit court is coextensive with that of the circuit judge.[81]

SAME—SAME—INJUNCTIONS TO STATE COURTS.

158. The federal courts may issue injunctions to the parties in state courts:

(a) In limited liability proceedings.

(b) In bankruptcy proceedings.

(c) Whenever it becomes necessary to protect their own jurisdiction previously acquired, or

(d) When an injunction is necessary to relief in a case in which it has had prior jurisdiction.

Criminal proceedings in a state court will not be enjoined.

[80] Searles v. Railroad Co., 2 Woods, 621, Fed. Cas. No. 12,586.

[81] Goodyear Dental V. Co. v. Folsom (C. C.) 3 Fed. 509; Gray v. Railroad Co., Fed. Cas. No. 5,713; McDowell v. Kurtz, 77 Fed. 206, 23 C. C. A. 119; U. S. v. Weber (C. C.) 114 Fed. 950.

Section 720 of the Revised Statutes [82] provides as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Notwithstanding the general language of this provision, the settled law on the subject is that a federal court will refrain from issuing injunctions to state courts only when the state court has first acquired jurisdiction.[83]

But it will issue injunctions to the state courts, or rather to the parties, wherever it is necessary to protect its own jurisdiction previously acquired, or when necessary to relief in a case of which it has had prior jurisdiction.[84]

The prohibition against injunctions to the state courts applies not simply to the courts or their officers, but to the parties as well. A federal court will not enjoin the parties from a proceeding in a state court any more than it will enjoin the court officers.[85]

Criminal proceedings in a state court will not be enjoined.[86]

This statute was first passed in 1793. The limited liability act of 1851 is not affected by it, and the federal courts will issue injunctions to state courts under that act to prevent vessel owners from being proceeded against in the state courts.[87]

The right to issue injunction proceedings in bankruptcy

[82] U. S. Comp. St. 1901, p. 581.

[83] Sharon v. Terry (C. C.) 36 Fed. 337, 1 L. R. A. 572; Terry v. Sharon, 131 U. S. 40, 9 Sup. Ct. 705, 33 L. Ed. 94; In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; MORAN v. STURGES, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981.

[84] Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497.

[85] Wagner v. Drake (D. C.) 31 Fed. 849; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644.

[86] Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399.

[87] Providence & N. Y. S. S. Co. v. Manufacturing Co., 109 U. S. 578, 3 Sup. Ct. 379, 27 L. Ed. 1038; MORAN v. STURGES, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; In re Whitelaw (D. C.) 71 Fed. 783.

cases is expressly reserved by this act; in fact, it is allowable to enjoin proceedings in state courts which contravene the provisions of the bankrupt act even by such summary process as by rule to show cause.[88]

SAME—THE PROCESS.

159. Process issues upon the filing of the bill. It is usual to file with the clerk a præcipe for process. A general appearance is a waiver of issuance or service of process. Service of process must be strictly in accordance with equity rule 13, and the return must show such service.

Form of Process.

On filing the bill the process issues. It is usual to file with the clerk a præcipe for process, and not to rely upon him to issue the process merely because it is prayed in the bill. In fact, under the provisions of equity rule 12, which provides that, "whenever a bill is filed the clerk shall issue the process and subpœna thereon as of course upon the application of the plaintiff, which shall be returnable in the clerk's office the next rule day or the next rule day but one at the election of the plaintiff, occurring twenty days after the issuing thereof," it is implied that a præcipe is necessary in order to indicate the rule day to which the process is returnable. Under equity rule 7 the process of subpœna constitutes the proper mesne process in all suits in equity in the first instance to require the defendant to appear and answer the exigency of the bill. This notifies the defendant to appear on a given rule day, and it is provided by rule 12 that at the bottom shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill will be taken pro confesso.

As the only object of the issuance and service of process is to notify the defendant of the proceedings against him, it is unnecessary in case the defendant on hearing of the proceed-

[88] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1188.

ing voluntarily appears. A general appearance on his part is a waiver of the issuance or service of process.[39]

Under equity rule 2 the first Monday of each month is a rule day, and the process is returnable to the rule day designated by the plaintiff in his præcipe.

Service of Process.

Equity rule 13 provides as follows:

"The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family."

As notice of suit is essential to the defendant in order to enable him to protect himself, the provisions as to service must be carefully obeyed, and the return must show that they have been so obeyed. Hence, where the return was to the effect that the service had been made on an adult person, who resided in the defendant's place of abode, the court held it insufficient. It was also held that the return must show that the party on whom it was served was a member or resident in the family of the defendant, not merely an adult resident in the defendant's place of abode, as such a person might be a mere stranger, like a guest at a hotel, for instance, if the defendant resided at a hotel.[40] The service need not necessarily be in a dwelling house, and hence a service was upheld which was made in a grocery store in a dwelling house which was all one building, and the party who kept the store lived upstairs.[41]

A process of subpœna is necessary in order to bring the defendants into court, even though other notices may have been served on them. For instance, where in an injunction bill, an order to show cause why the injunction should not be

[39] Seattle L. S. & E. R. Co. v. Trust Co., 79 Fed. 179, 24 C. C. A. 512.

[40] Blythe v. Hinckley (C. C.) 84 Fed. 228.

[41] Phœnix Ins. Co. v. Wulf (C. C.) 1 Fed. 775.

issued was served on the defendant, it was still held that process was necessary.[42]

Notwithstanding the provisions of this rule, substituted service is sometimes permissible. This is usually the case when the proceeding is ancillary to some other proceeding. In such case service may be made upon the plaintiff's attorney. But the record should show the necessity for such service, and an order of court should be obtained allowing it.[43]

It has also been seen in another connection that in case of certain proceedings to foreclose an equitable lien, service may be made by publication.[44]

Service must be made by the marshal or his deputy, general or special.[45]

SAME—DEFAULTS.

160. If the defendant does not appear and defend within the time required by the equity rules, the plaintiff may take a decree by default; in which case no proof is necessary if the allegations of the bill are sufficient as a basis for a decree.

The defendant is required by rule 17 to enter his appearance at the rule day to which the process is returnable, if he has been served twenty days before that rule day, otherwise at the next succeeding rule day.

Rule 18 requires that he shall file his plea, demurrer, or answer at the next rule day after his appearance. This rule provides also that, in default of his doing so, the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty

[42] Wheeler v. Walton & Whann Co. (C. C.) 65 Fed. 720.

[43] Abraham v. Insurance Co. (C. C.) 37 Fed. 731, 3 L. R. A. 188; Gregory v. Pike, 79 Fed. 520, 25 C. C. A. 48.

[44] Ante, p. 233 et seq.

[45] Hyman v. Charles (C. C.) 12 Fed. 855.

days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed.

And equity rule 19 provides as follows:

"When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause."

Under these rules a final decree cannot be entered until at least one rule day after the appearance.[46]

When the bill is so taken for confessed, the only questions left open are such questions as cannot be covered by the averments of the bill; as, for instance, the amount of damages in an infringement suit. The fact of infringement is no longer open.[47]

And after default no proof is necessary on the allegations of the bill.[48]

If, however, the allegations of the bill themselves are insufficient to support a decree, a default cannot be entered even where no appearance or defense has been interposed.[49]

The default necessary to justify a decree by default is a default due to the failure of the defendant to appear and defend. If he has appeared and defended, the court cannot strike his

[46] O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840.

[47] Reedy v. Electric Co., 83 Fed. 709, 28 C. C. A. 27.

[48] THOMSON v. WOOSTER, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

[49] Wong Him v. Callahan (C. C.) 119 Fed. 381.

answer from the files as a punishment for contempt, and then proceed against him as for a default. Such action would not be due process of law.[50]

If the defendant has appeared, even though he has not defended, he is in court so far that he is entitled to notice of any application for final decree even after default; for he has the right to be heard at least as to the form of final decree to be entered, though he may not care to defend on the merits.[51]

A final decree entered on a default cannot be set aside after the expiration of the term at which it is entered.[52]

If, however, the decree entered upon default is only interlocutory in its nature, it may be set aside at a subsequent term.[53]

But if the decree was entered by default in a case where the court had not acquired jurisdiction by service of process or otherwise, it may be set aside on motion even at a subsequent term, as it is no decree at all.[54]

This doctrine that a default decree, if final, cannot be set aside, must not be confounded with the right of the court under equity rule 88 to grant a rehearing in ordinary cases at any time during the succeeding term.[55]

SAME—THE DEFENSE

161. Matters of abatement must be pleaded first, and a general appearance acts as a waiver of a special appearance.

Any matter of abatement as to the merits may be raised by demurrer, if the question is apparent on the face of the bill.

[50] Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

[51] Bennett v. Hoeffner, Fed. Cas. No. 1,320; Southern Pac. R. Co. v. Temple (C. C.) 59 Fed. 17.

[52] Austin v. Riley (C. C.) 55 Fed. 833; Stuart v. St. Paul (C. C.) 63 Fed. 644.

[53] Blythe v. Hinckley (C. C.) 84 Fed. 228.

[54] Eldred v. Car Co. (C. C.) 103 Fed. 209.

[55] MOELLE v. SHERWOOD, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350.

A plea presents some single distinct defense which will defeat the cause of action and save the trouble and expense of going into the case on the general issues.

Under equity rule 31 no demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact.

Matters of Abatement.

These matters which merely defeat the special suit, and do not prevent other suits on the same cause of action, are required to be pleaded first. The most familiar instance of them is the method of questioning the jurisdiction. It is also a well-known principle of pleading that those matters of abatement which can only be set up by a special appearance cannot be joined with matters going to the merits, and required to be set up by general appearance, for the filing of a defense going to the merits is a waiver of defenses questioning the jurisdiction.[56]

A question in abatement like the jurisdiction of the court as a federal court either over the subject-matter or person is raised by demurrer, if it appears from the facts stated in the bill itself.[57]

If, however, the facts necessary to show the lack of jurisdiction do not appear on the face of the bill, the question is raised by a plea. The object of a plea in equity is to present some single distinct defense which will defeat the cause and save the trouble and expense of going into the case on the general issues.[58]

Matters in Bar.

The first method of setting up defenses in practice which go to the defeat of the entire action is by demurrer. This puts

[56] Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935.

[57] Southern Pac. R. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377.

[58] U. S. v. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354;

in issue only such defenses as necessarily appear from the face of the bill. Under equity rule 31 no demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact. It has already been seen that a bill must be signed by counsel, and that such signature of counsel is a pledge of good faith. This rule is dictated by the same policy, and is intended to prevent sham defenses interposed for mere delay. The certificate of counsel should not be considered as a mere form, and should only be annexed when the counsel is honestly of the opinion that his demurrer is a substantial one. The effect of failing to annex this certificate is that the plaintiff may disregard the demurrer entirely, and treat it as never having been filed, and the court will also so treat it.[59]

The failure to annex the certificate to a plea is treated in the same way.[60]

Instances of Defense Available by Demurrer.

A demurrer is the proper way to raise the question that there is an adequate remedy at law. If the case asserted in the bill belongs to any general class of jurisdiction in which an equity court is competent to grant relief, the failure to demur is a waiver of the right to make the point that there is an adequate legal remedy.[61]

The defense that the plaintiff has been guilty of laches, or that his claim is barred by the statute of limitations, can also be raised by demurrer if the necessary facts appear on the bill.[62]

FARLEY v. KITTSON, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684; Knox Rock-Blasting Co. v. Stone Co. (C. C.) 87 Fed. 969.

[59] Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853.

[60] Central Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

[61] Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.

[62] Speidell v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718;

The defense that the bill does not show any equity is also available by demurrer, if appearing on the face of the bill. But the court will grant relief under such circumstances if, on any possible state of the evidence or the facts contained in the bill, it could give relief, even though those facts may be stated vaguely. The defects in the statement should be availed of rather by demurrer pointing out the special defects than by general demurrer.[63]

Facts Admitted by Demurrer.

It is the well-established principle of pleading that a demurrer admits only facts well pleaded; not general statements or inferences or conclusions of law.[64]

Joinder of Issue on Demurrer.

The proper method of taking issue on a demurrer is to set it down for argument as provided by equity rule 33. If the plaintiff does not set it down for argument on the rule day when it is filed, or the next succeeding rule day, he admits its truth and sufficiency, and an order for a dismissal of his bill is of course.

The proper method of setting it down for argument is to have a memorandum to that effect made in the clerk's office under authority conferred by equity rule 5.[65]

Decision on Demurrer.

In case the demurrer is overruled, it is required by equity rule 34 that the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, at the next succeeding rule day, or at such other period as, consistent with justice and the rights of the defendant, the same, in the judgment of the court, can be reasonably done; in de-

Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189; Nash v. Ingalls, 101 Fed. 645, 41 C. C. A. 545.

[63] Pacific Live Stock Co. v. Hanley (C. C.) 98 Fed. 327; Failey v. Talbee (C. C.) 55 Fed. 892.

[64] Preston v. Smith (C. C.) 26 Fed. 884; Cornell v. Green (C. C.) 43 Fed. 105.

[65] Gillette v. Doheny (C. C.) 65 Fed. 715.

fault whereof the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.

The defendant is entitled as a matter of right to time to answer when his demurrer is overruled.[66]

In case the demurrer is sustained, the court may, in its discretion, under the authority given by equity rule 35, allow the plaintiff to amend his bill on such terms as it shall deem reasonable. In fact, under equity rule 29 the plaintiff may obtain an order to amend his bill after the filing of a demurrer, and before any decision upon it. This right to amend the bill after decision is discretionary with the court, and is not a matter of absolute right. If the plaintiff has been negligent about it, or has unduly delayed his request to amend, the court may, in its discretion, refuse him the right.[67]

In cases of extraordinary importance the court may refuse to pass upon a demurrer even though it may consider the same probably well founded, and may proceed to hear the proofs.[68]

The Plea.

The office of a plea in equity is to set up facts constituting a single defense, which will save the defendant from the necessity of answering the bill, or which will be so decisive of the case as to obviate the necessity of an answer and defense on all the issues raised. A plea cannot merely set up the facts in the bill, for, if the defense appears on the face of the bill, a demurrer is the proper method of raising the question. It can, however, set up additional facts which, coupled with the facts of the bill, constitute a complete defense.[69]

A plea must present a single defense. In doing this it may set up many facts, but they must all look to a single defense.[70]

[66] Wooster v. Blake (C. C.) 7 Fed. 816.

[67] Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Edward P. Allis Co. v. Lumber Co., 105 Fed. 680, 44 C. C. A. 673.

[68] Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.

[69] Missouri Pac. R. Co. v. Railroad Co. (C. C.) 50 Fed. 151.

[70] Hazard v. Durant (C. C.) 25 Fed. 26.

A plea may be purely negative if the nature of the defense admits, and may deny different facts, provided the facts so denied make up only one issue.[71]

Under equity rule 31, a plea must be accompanied with a certificate of counsel that, in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and that it is true in point of fact. The defendant, as a matter of right, can file but one plea raising a single defense; for it is the object of pleading to narrow the issues so as to make but a single defense to be considered by the court at any one time. But, while only one plea can be filed at any one time as a matter of right, the court may, in its discretion, permit the defendant to file more than one.[72]

The proper way to raise the point of another action pending is by plea.[73]

It is important to bear in mind, however, in this connection that the pendency of a suit in a state court cannot be pleaded in bar to a suit in the federal court, though the latter may, in its discretion, suspend action upon the case pending in this court until the case in the state court is disposed of.[74]

Joinder of issue on a plea is provided by equity rule 33, which says:

"The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."

The effect of setting down a plea to be argued is equivalent to demurring to it. It is an admission of the facts in it, but

[71] Rhino v. Emery (C. C.) 79 Fed. 483.

[72] Bunker Hill & Sullivan Mining & Concentrating Co. v. Mining Co., 109 Fed. 504, 47 C. C. A. 200; Gilbert v. Murphy (C. C.) 100 Fed. 161.

[73] Pierce v. Feagans (C. C.) 39 Fed. 587.

[74] Bunker Hill & Sullivan Mining & Concentrating Co. v. Mining Co., 109 Fed. 504, 47 C. C. A. 200.

denies that they constitute a defense. There is no such thing in proper equity practice as a demurrer to a plea, though the court may treat a paper called a demurrer as equivalent to setting it down for argument.[75]

As the plaintiff can only make one defense to a plea at any one time, he must first set it down for argument, and dispose of that issue alone, if he wishes to question its legal sufficiency. If he does not wish to question its legal sufficiency, or if that issue is decided against him, then he can take issue on the plea, which is done by filing a replication, and thereby the facts in the plea are put at issue.[76]

Under the old chancery practice joining issue upon a plea was an admission of its legal sufficiency. Under equity rule 33, which provides that, if the facts are determined for the defendant, they shall avail him as far as in law and equity they ought to avail him, this has been changed; so that now, even if the facts are found for the defendant, and there is enough outside these facts to justify a decree, the plaintiff ought to have it This is the natural construction of the rule, and would seem to be settled by the case of Pearce v. Rice.[77]

In view of this decision it is hard to sustain the case of Daniels v. Benedict,[78] which holds that taking issue on a plea admits its legal sufficiency. It refers as authority for this proposition to decisions of the Supreme Court made before the adoption of equity rule 33, and expressly distinguished in the above case of Pearce v. Rice. It refers in addition to the later case of United States v. California & O. Land Co.[79] This case, however, though containing quotations from text-books giving the old English chancery rule, does not purport to overrule, and does not even cite, Pearce v. Rice, and can hardly be con-

[75] Zimmerman v. SoRelle, 80 Fed. 417, 25 C. C. A. 518.

[76] McVeagh v. Waterworks Co., 85 Fed. 74, 29 C. C. A. 33.

[77] 142 U. S. 28, 12 Sup. Ct. 130, 35 L. Ed. 925. See, also, Elgin Wind Power & Pump Co. v. Nichols, 65 Fed. 215, 12 C. C. A. 578.

[78] 97 Fed. 367, 38 C. C. A. 592.

[79] 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354.

sidered as intended to announce a contrary doctrine, or to repeal the clear language of rule 33. The later case of Green v. Bogue [80] also holds that joining issue upon a plea after setting it down for argument and a decision holding it good in law was not a waiver of the right to question its legal sufficiency in the appellate court. In other words, the plaintiff does not abandon the benefit of his legal defense by subsequently joining issue in fact instead of standing upon his legal defense. The effect of a decision on a motion to set a plea down for argument if in favor of the complainant is that the defendant should be allowed time to reply in fact.[81]

The defendant may, if he so elects, stand upon his issue of law without joining issue in fact. The effect of a decision in favor of the complainants, where the defendant has replied to a plea, and thereby raised a question of fact, is that the defendant should be given time to answer.[82]

Hence a defense of fact may be set up by a plea, and may be decided against the defendant, and the defendant will still have the right to answer, with the attendant necessity of taking evidence and trying the case upon the issues raised by the answer. The effect of a decision for the defendant on a plea is that, if it goes to the whole bill, it is a final disposition of the case, and should result in a decree for the defendant.[83]

[80] 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061.

[81] McVeagh v. Waterworks Co., 85 Fed. 74, 29 C. C. A. 33.

[82] Equity Rule 34; Westervelt v. Library Bureau, 118 Fed. 824, 55 C. C. A. 436.

[83] Horn v. Dry Dock Co., 150 U. S. 610, 14 Sup. Ct. 214, 37 L. Ed. 1199.

CHAPTER XIX.

PROCEDURE IN THE ORDINARY FEDERAL COURTS OF ORIGINAL JURISDICTION (Continued)—COURTS OF EQUITY (Continued).

162. The Defense (Continued)—The Answer.
163. Same—Same—Joinder of Issue on.
164. The Proofs.
165. Same—Testimony on Commission and Interrogatories.
166. Same—Testimony in Open Court.
167. Same—Testimony by Deposition.
168. Same—Testimony before Examiner.
169. References.
170. The Decree—Form of.
171. Same—Its Enforcement.
172. Same—Reopening of Decree.

THE DEFENSE (Continued)—THE ANSWER.

162. The answer is the method of setting up a defense on the general issues, and asserts detailed defenses to all the charges of the bill, and must be responsive to the whole of it.

Under the policy of narrowing issues, the defendant is not allowed to plead, answer, and demur to the entire bill at the same time, though a limited overlapping of defenses is allowable under the practice.

Answer waives plea or demurrer to the whole bill, but not to part of same not entirely covered by the answer.

Answer under oath has probative force, and is conclusive unless contradicted by two witnesses, or one witness and strong corroborating circumstances, provided the complainant does not waive answer under oath.

Statements in the bill unnoticed in the answer are not considered as admitted, but must be proved.

If the issues raised by a demurrer and plea have been decided against the defendant, his next and final defense is by answer. Equity rule 32 provides as follows: "The defend-

ant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded."

There may be only a limited amount of overlapping of defenses under these circumstances. Equity rule 37 provides as follows: "No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

Under these two rules an answer waives any plea or demurrer going to the whole bill which has been previously filed, and not acted upon by the court. This is a well-established rule of equity pleading.[1]

But if the plea or demurrer does not cover the whole bill, and the answer does not cover the entire matter of defense set up by the plea or demurrer, then demurrers, pleas, and answers may be filed at the same time.[2]

An answer in equity, if under oath and responsive to the charges of the bill, is more than a simple pleading putting facts in issue. It has probative force in itself, and is conclusive unless overcome by the testimony of two witnesses, or one witness and corroborating circumstances. This rule, coming from the doctrines of the civil law, is firmly established in chancery practice.[3]

[1] Hudson v. Randolph, 66 Fed. 216, 13 C. C. A. 402; Huntington v. Laidley (C. C.) 79 Fed. 865; Grant v. Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; Strang v. Railroad Co., 101 Fed. 511, 41 C. C. A. 474.

[2] Mercantile Trust Co. v. Railroad Co. (C. C.) 84 Fed. 379; Grant v. Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905.

[3] LATTA v. KILBOURN, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169; Coonrod v. Kelly, 119 Fed. 841, 56 C. C. A. 353.

But this rule ceases where the reason for it no longer exists, and hence even an answer under oath, professing not to be on personal knowledge, has no probative force, and merely puts the matter in issue.[4]

The complainant, however, if he wishes to avoid the effect of an answer as evidence, can do so, under the provisions of equity rule 41, by waiving an answer on oath. In such case it has no probative force, even though the defendant should choose to swear to it.

Statements in the bill neither admitted nor denied by the answer are not considered as impliedly admitted, but must be proved, for the plaintiff has the right to except to the answer for insufficiency if it is not fully responsive, and, if he fails to do so, he cannot claim that it is an admission of any unnoticed statement.[5]

The defenses available by means of answer are all issues raised in the bill. Even matters of law may be set up by answer.[6]

The defendant is not bound to set up defenses by plea which could probably be set up in that manner, but, under the express provision of rule 39, he may set these also up by answer; and, if he chooses to do so, he cannot be required in his answer to respond to any other matters than he would have been required to answer if he filed a plea and an answer in support of the plea. Under such circumstances, he can even fail to answer interrogatories.[7]

An answer may set up the same defense in different aspects, with different statements of fact connected therewith, but it cannot set up inconsistent defenses, and facts to support them, for an answer is supposed to be under oath, and an equity

[4] Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Savings & Loan Soc. v. Davidson, 97 Fed. 696, 38 C. C. A. 365.

[5] Lovell v. Johnson (C. C.) 82 Fed. 206.

[6] Farmers' Loan & Trust Co. v. Railroad Co. (C. C.) 76 Fed. 15.

[7] Gaines v. Agnelly, Fed. Cas. No. 5,173; Hatch v. Bancroft-Thompson Co. (C. C.) 67 Fed. 802; Holton v. Guinn (C. C.) 65 Fed. 450.

court will not allow the litigant to swear to two entirely opposite and inconsistent statements of fact.[8]

Under equity rule 52, want of parties may be set up by answer.

Answer to Interrogatories.

As the plaintiff may propound interrogatories to the defendant in the bill, the answer must contain the replies to these interrogatories. But the defendant is not required to answer interrogatories which he may have avoided answering by demurrer.[9]

If, however, he declines to answer interrogatories, he cannot merely state that he does so under advice, but he must give the reasons why he declines to answer them, so as to enable the court to say whether he has any good reason.[10]

He can decline to answer an interrogatory on the ground that it would require him to disclose a trade secret.[11]

SAME—SAME—JOINDER OF ISSUE ON.

163. The joinder of issue on an answer may be accomplished
(a) By exception;
(b) By replication;
(c) By setting case for hearing on bill and answer.
Even matters of law may be set up by answer.

Exceptions.

Issue is joined on an answer in the first place by exceptions thereto.[12]

There is no such thing as a demurrer to an answer.[13]

[8] Ozark Land Co. v. Leonard (C. C.) 24 Fed. 660; Von Schroder v. Brittan (C. C.) 98 Fed. 169.

[9] Rule 44.

[10] Boyer v. Keller (C. C.) 113 Fed. 580.

[11] Federal Manufacturing & Printing Co. v. Bank Note Co. (C. C.) 119 Fed. 885.

[12] Rule 61.

[13] Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498; Stokes v. Farnsworth (C. C.) 99 Fed. 836.

The office of exceptions is to compel a thorough answer; that is, to raise the question of its insufficiency, and also to object for impertinence or scandal.[14]

Replication.

If the issue to the answer is an issue of fact, it is raised by general replication.[15] Special replications can no longer be used in the federal chancery practice. The replication must be in writing, and must be actually filed. The practice in some states (Virginia, for instance) of having the clerk merely enter up a replication on the docket does not prevail in the federal court.[16]

Hearing on Bill and Answer.

Another step, which practically amounts to joining issue on the answer, is by setting the case for hearing on bill and answer. This is tantamount to the position that the answer is so insufficient as not to amount to a legal defense—in other words, to a demurrer to the answer.[17]

But when this step is taken, the sufficiency of all the facts well pleaded in the answer, whether they consist of mere denials of the bill, or of defenses, of new matter, is admitted; and the plaintiff, by resorting to it, runs the risk of making his case rest upon the position that he is entitled to a decree upon bill and answer, and, if he should turn out to be mistaken, he has no further right to insist upon joining issue and taking proofs.

[14] Barrett v. Power Co. (C. C.) 111 Fed. 45.

[15] Rules 45, 66.

[16] Coleman v. Martin, Fed. Cas. No. 2,986; Washington, A. & G. R. Co. v. Bradley, 10 Wall. 302, 19 L. Ed. 894.

[17] Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425.

THE PROOFS.

164. The evidence in equity causes is by deposition, except where the equity rules permit testimony in open court.

By section 862 of the Revised Statutes [18] it is provided that "the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

The special provisions alluded to are those authorizing the taking of depositions. Subject to these provisions, the equity rules make elaborate provisions for the taking of testimony. They are contained in Rules 67 to 71, inclusive.

SAME—TESTIMONY ON COMMISSION AND INTERROGATORIES.

165. The equity rules authorize the issuing of commissions to take testimony after due notice.

The first two paragraphs of rule 67 provide as follows:

"After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue ex parte. "In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony."

[18] U. S. Comp. St. 1901, p. 661.

This is the rule under which testimony is taken by filing interrogatories and having the witnesses answer them. The provisions as to taking testimony must be strictly followed.[19]

Rule 71 sets out the form of general interrogatory which is always put at the last, after the special questions framed to meet the special case. It is as follows:

"The last interrogatory in the written interrogatories to take testimony, now commonly in use, shall in the future be altered, and stated, in substance, thus: 'Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.'"

Under this interrogatory the witness may give any information which he may possess pertinent to the issue, even though he has not been specially interrogated in reference thereto.[20]

And this general interrogatory must be answered, or the deposition is fatally defective.[21]

SAME—TESTIMONY IN OPEN COURT.

166. The judge is given discretionary power to hear testimony ore tenus.

One of the paragraphs of equity rule 67 provides as follows:

"Upon due notice given, as prescribed by previous order, the court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court, on final hearing."

This is quite a departure from the usual practice which has always prevailed in an equity court, and it is entirely within

[19] Rhoades v. Selin, Fed. Cas. No. 11,740.
[20] Rhoades v. Selin, Fed. Cas. No. 11,740.
[21] Richardson v. Golden, Fed. Cas. No. 11,782.

the discretion of the court whether to permit it or not. It is rarely allowed, on account of the time of the judge which it necessarily consumes. When, however, the engagements of the judge permit, it is an advantageous proceeding, because it enables him to see the witnesses and judge of their testimony much better than by merely reading it on paper. This course cannot be taken, however, unless notice has been given to all parties.[22]

In case there are objections to evidence during the conduct of such an examination, although the evidence is decided by the lower court to be improper, it should be taken down, subject to exception, as otherwise the appellate court would have no means of passing upon the propriety of ruling the testimony out; bills of exception being no part of any equity proceeding.[23]

SAME—TESTIMONY BY DEPOSITION.

167. Testimony may also be taken by deposition, either under the provisions of the Revised Statutes, or under the state practice.

Rule 68 provides as follows:

"Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable."

In addition to the acts of Congress, it may also be taken under the recent act permitting testimony to be taken in accordance with the state practice.[24]

[22] Mears v. Lockhart, 94 Fed. 274, 36 C. C. A. 239.

[23] Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521; Mears v. Lockhart, 94 Fed. 274, 36 C. C. A. 239.

[24] Ante, p. 364.

Rule 68 implies that depositions under its provisions can be taken without notice to the adverse party, although he can afterwards demand the right of cross-examination or retaking the deposition under the circumstances provided by the rule.

Under rule 70, testimony may also be taken de bene esse, but this can only be done after the cause is at issue.[25]

The sixty-ninth rule limits the time of taking testimony to three months after the cause is at issue, and this rule is enforced unless the parties agree to extend it, either expressly or impliedly. It would seem clear that any action of the party that would constitute a waiver of the right to object on the ground of the limitation of time would be considered such an agreement—as, for instance, appearing and cross-examining without raising the objection.[26]

This limitation of three months applies to the testimony of the plaintiff and defendant both, but the court is liberal in extending the time on any proper showing.[27]

This limitation applies only to testimony taken by deposition, not to testimony taken on reference.[28]

SAME—TESTIMONY BEFORE EXAMINER.

168. Rule 67 also provides that on due notice the court may enter an order that the testimony in the case be taken before one of the examiners of the court, or one specially appointed. As last amended, it permits the testimony to be taken down by a stenographer.

The examiner is practically a clerk to take the testimony down, and is not expected to do more than to see that it is taken down properly, and then report it to the court. He has

[25] Stevens v. Railroad Co. (C. C.) 104 Fed. 934.

[26] Werham v. Switzer (C. C.) 48 Fed. 612; Western Electric Co. v. Telegraph Co. (C. C.) 86 Fed. 769; Brown v. Worster (C. C.) 113 Fed. 20.

[27] Ingle v. Jones, 9 Wall. 486, 19 L. Ed. 621.

[28] Coosaw Min. Co. v. Mining Co. (C. C.) 67 Fed. 31.

no power to pass upon any questions of evidence that may arise, but he may state any questions to the court that he may judge to be proper. He can compel the attendance of witnesses, and, when the testimony is completed, he transmits it to the clerk of the court. Under this part of the rule, an examiner may be appointed outside of the jurisdiction of the court, and may compel the attendance of witnesses outside of such jurisdiction.[29]

The witnesses under examination should answer questions put to them, though they may be irrelevant, but the court will protect them from answering any questions which merely pry into their private affairs.[30]

Objections to questions should specify the ground of the objection sufficiently to advise the court, or they will not be considered.[31]

REFERENCES.

169. It is common in chancery cases to have references of various matters to special masters or commissioners. This, however, is not a matter of right.

When special questions are referred to a master, his report is entitled to great weight, because of his superior facilities for investigation; but his findings are not conclusive, and may be set aside by the court.

Exceptions to a master's report must be filed within one calendar month from the filing of the report. Objections to the report must be taken at the time the same is read to the parties by the master.

Exceptions are not necessary for the purpose of raising questions of law appearing on the face of the report.

On consent of parties, the court may refer to a master the entire question, both of law and fact, in the case. When this is done, the decision of the master is pre-

[29] White v. Railroad Co., 79 Fed. 133, 24 C. C. A. 467. In re Spofford (C. C.) 62 Fed. 443; J. L. Mott Ironworks v. Manufacturing Co. (C. C.) 48 Fed. 345.

[30] Robinson v. Railroad Co. (C. C.) 28 Fed. 340.

[31] Hamilton v. Mining Co. (C. C.) 33 Fed. 562.

sumptively correct, and can be overruled only when there has been manifest error in the consideration given to the evidence, or in the application of the law.

In almost every chancery case there is occasion for references of various matters to special masters or commissioners. A reference, however, is not a matter of right, and is not allowed unless the plaintiff shows a prima facie case; nor is it allowed for the mere purpose of aiding him to make out his case.[32]

Nor is the court bound to refer any questions, but it may, if it sees fit, go into questions of account itself, or have the accounts made up at the bar of the court.[33]

The appointment of masters in chancery is provided by rule 82, which allows circuit courts to appoint standing masters in chancery in their respective districts, or to appoint a master pro hac vice in any particular case. Their duties are well defined by Justice Field in the case of Kimberly v. Arms.[34]

Under the act of March 3, 1879,[35] clerks or their deputies should not be appointed special masters unless the court certifies in the order that there is a good reason for such appointment in the special case. If, however, they are appointed, such appointment cannot be questioned collaterally, and their acts are valid.[36]

There are no special statutes regulating the amount of compensation of such masters, but that is a question of discretion in the court.[37]

The practice of referring the whole case to a master has been

[32] Columbian Equipment Co. v. Trust Co., 113 Fed. 23, 51 C. C. A. 33.

[33] Brown v. Grove, 80 Fed. 564, 25 C. C. A. 644.

[34] KIMBERLY v. ARMS, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764.

[35] 20 Stat. 415, c. 183 [U. S. Comp. St. 1901, p. 591].

[36] Seaman v. Insurance Co., 86 Fed. 500, 30 C. C. A. 212.

[37] Finance Committee v. Warren, 82 Fed. 525, 27 C. C. A. 472.

frequently disapproved, for only separate questions should be referred to him.

If an order is entered by consent of both parties referring to him all questions in the case, it comes very near an arbitration, and his findings in such case are very difficult to question. On this subject Chief Justice Field says in the case of Kimberly v. Arms: [88]

"A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard, in whole or in part, according to its own judgment as to the weight of the evidence. * * *

"It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent, and his determinations are not subject to be set aside and

[88] KIMBERLY v. ARMS, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. See, also, Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case, for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct—subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

But where the master is appointed otherwise than by consent, and only special questions are referred to him, his findings, while strong, are not conclusive. There is always a presumption in favor of such findings, as he has had the opportunity of seeing the witnesses themselves, and has other facilities for judging of the value of their testimony which are not available to the court. But in such case they can be questioned with some show of success.[39]

A master, in exercising a reference, may take testimony outside of the district.[40]

When the master's report is completed and filed in the clerk's office, the parties have one month therefrom for the purpose of filing exceptions; and this means a calendar, not a lunar, month.[41]

Great care is requisite in the preparation of these exceptions. Exceptions to questions of fact cannot be taken at all unless the evidence is sent up with the report.[42]

[39] Bosworth v. Hook, 77 Fed. 686, 23 C. C. A. 404; Taintor v. Bank (C. C.) 107 Fed. 825; Girard Life Ins., Annuity & Trust Co. v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. Ed. 1062.

[40] Consolidated Fastener Co. v. Fastener Co. (C. C.) 85 Fed. 54.

[41] Rule 83; Gasquet v. Brewing Co. (C. C.) 49 Fed. 493.

[42] SHEFFIELD & B. COAL, IRON & R. CO. v. GORDON, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164.

Nor can they be first taken in the appellate court.[43]

They must be specific, must raise clearly defined issues, and, when to questions of fact, they should refer to the part of the testimony relied on to set the finding aside.[44]

The proper practice in reference to the preparation of exceptions is for the master, when he has completed his draft of report, and before he files it, to notify the different parties interested to appear before him, and then to submit it to them. When they so appear, they should point out to him the parts in it in which they think he is in error, so as to give him the opportunity of correcting it if he sees fit; and he should embody in his report a statement that the parties had excepted to certain parts. This procedure is rendered necessary by the line of decisions which hold that matters not brought to the attention of the master cannot be made the subject of exception.[45]

If the master should disregard this practice, and file his report without giving the parties an opportunity, it would seem pretty clear, under the language of the eighty-ninth rule, that they could then file their exceptions anyhow.

Exceptions are not necessary for the purpose of raising questions of law appearing on the face of the report.[46]

The reports which can be excepted to within one month are those reports referred to the master in which he acts in a semijudicial capacity, but the rule does not apply to the right of a special master appointed to conduct sales of property.[47]

[43] Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

[44] SHEFFIELD & B. COAL, IRON & R. CO. v. GORDON, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; Stanton v. Railroad Co., Fed. Cas. No. 13,296; Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264.

[45] Columbus S. & H. R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504; Gay Mfg. Co. v. Camp, 68 Fed. 67, 15 C. C. A. 226.

[46] Home Land & Cattle Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642; Burke v. Davis, 81 Fed. 907, 26 C. C. A. 675; Celluloid Mfg. Co. v. Manufacturing Co. (C. C.) 40 Fed. 476.

[47] Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

An exception should not be used as a means of setting up a new defense in the case which has not already appeared in the pleadings.[48]

The master, in the exercise of a sound discretion, may permit new evidence after he has submitted the draft of report to the parties, if he thinks the equities of the case call for it.[49]

But after the report has been drafted it is not permissible for a petitioner to come in and amend his petition so as to set up a new ground of recovery thereon.[50]

THE DECREE—FORM OF.

170. In the federal practice, it is not necessary, in preparing the decree, to "bring the case on," as it is technically called, by reciting all the previous proceedings in the case.

A decree may simply commence as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed as follows," etc.[51]

SAME—ITS ENFORCEMENT.

171. Equity decrees are enforceable:
(a) Against the property of the parties:
(1) By writ of execution if the decree is for money;
(2) By a sale of the property under a master commissioner in other cases.
(b) Against the parties themselves when the purpose of the suit is to compel some specific act by them.

An equity decree may, under some circumstances, be enforced against the property of the parties, and, under others,

[48] City of New Orleans v. Warner, 180 U. S. 199, 21 Sup. Ct. 353, 45 L. Ed. 493.

[49] Central Trust Co. v. Railroad Co. (C. C.) 89 Fed. 761.

[50] Central Trust Co. v. Railway Co. (C. C.) 75 Fed. 41.

[51] Rule 86.

against the parties themselves, and it must be considered under these two distinctions.

(*a*) *Against Property of Parties.*

Final process to execute a decree, if it is for money, is by writ of execution in the form used in the circuit court in actions of assumpsit.[52]

If the decree is not simply for money, but contemplates the sale of property under control of the court, its method of enforcement is the appointment of a standing or special master to conduct the sale. It is usual to require a bond of such an officer, but is not necessary, for frequently the provisions of the decree are such that the master does not handle the money, which is paid into court or otherwise provided for.[53]

By Sale.

A recent act has made many provisions in reference to sales of property in the federal courts which it is important to observe. It is the act of March 3, 1893, and is as follows: [54]

"Be it enacted," etc., "that all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless, in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four

[52] Rule 8.

[53] Seaman v. Insurance Co., 86 Fed. 493, 30 C. C. A. 212.

[54] 27 Stat. 751, c. 225 [U. S. Comp. St. 1901, p. 710].

weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

This statute, however, has been construed to be intended as a safeguard for the protection of the defendant, from which it follows that its provisions may be waived by him either expressly or impliedly. Hence when a sale was conducted not in strict accordance with its terms, but was confirmed after notice to the defendant, and no objection by him, it was held to be valid.[88]

Sales of Real Estate.

It is an interesting and important question whether Congress intended by the first section of this act to require that sales of real estate should only be by public auction. Courts of chancery prior to its enactment had exercised a general power in selling property in other ways than by public auction, where those other ways were likely to realize a better price. The practice of calling for sealed bids, for instance, was not uncommon. The court would be seriously hampered in its chancery proceedings if this statute was intended to abolish this practice; and, notwithstanding the general language of the first section, the likelihood is that Congress meant, not that all sales should be at public auction, but that all sales which were at public auction should be conducted as therein provided.

In conducting a judicial sale, the bid of an intending pur-

[88] Nevada Nickel Syndicate v. Nickel Co. (C. C.) 103 Fed. 391; National Nickel Co. v. Syndicate (C. C.) 106 Fed. 111.

chaser is a mere offer, and the court may accept it or not, as it sees fit.[56]

A bidder at the judicial sale so far becomes a party to the cause that the court may proceed against him by rule to compel his compliance with his contract, and it is not necessary to bring a separate suit against him for the price.[57]

It follows from the above that, as a bid is a mere offer, the court may set the sale aside. But while it has this power, it is reluctant to use it, for it must be remembered that few parties would attend judicial sales unless they have some assurance that the sale will be a finality. Hence mere inadequacy of price is not sufficient to set a sale aside, unless it is so great as to shock the conscience; but it may at least result in the court looking into the facts more closely, and finding other grounds for refusing to confirm the sale.[58]

(*b*) *Enforcement against the Parties Themselves.*

Equity decrees are not only for the sale of property, but frequently for the purpose of compelling some specific act by the parties themselves. Hence, in enforcing such orders, equity must have some power to proceed against the parties personally. This is provided by equity rule 8.

It may Order Conveyances by the Party, or the Delivery up of Deeds or Other Documents.

Where at least a part of the property is within the jurisdiction of the court, it may transfer the title not only to the part within its jurisdiction, but also to that part without it, by ordering a master to make a deed to the property.[59]

[56] Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608; Tennessee v. Quintard, 80 Fed. 829, 26 C. C. A. 165.

[57] Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. Ed. 191; Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[58] SCHROEDER v. YOUNG, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; Magann v. Segal, 92 Fed. 252, 34 C. C. A. 323.

[59] MULLER v. DOWS, 94 U. S. 444, 24 L. Ed. 207; Central Trust Co. v. Railway Co. (C. C.) 29 Fed. 618; Boston Safe Deposit & Trust

In this respect the federal courts have such an advantage over the local tribunals that the large railway foreclosures generally find their way into the former courts. By means of their jurisdiction over the parties, and by means of ancillary bills filed in the districts where the realty lies, they can act more promptly, and within territory unknown to the local tribunals.

Compelling Obedience to Order.

The federal courts will not only order conveyances, but they have summary means of compelling obedience to their orders. Under the provisions of rule 8, if the defendant can be found, a writ of attachment will be issued against him, under which he will be held until he complies with all the requirements of the court. If he cannot be found, a writ of sequestration may issue against all his property, as a means of compelling obedience. And under the provisions of rule 9 the writ will lie to compel the delivery of possession. This writ is a proper means of putting a purchaser at a mortgage or other foreclosure sale in possession of the property purchased.[60]

A supplementary bill may also be used for this purpose where a writ of assistance is unavailing.[61]

A court will also by its process compel restitution of property to the proper party. For instance, where a lower court decided in favor of one party, and the case was afterwards reversed, it was held that the lower court could compel the party who had meanwhile collected the money to pay it back, although the ground of reversal was lack of jurisdiction in the lower court, for it retained at least enough jurisdiction to undo the wrong that it had done.[62]

Co. v. Telegraph Co. (C. C.) 36 Fed. 289; Woodbury v. Railroad Co. (C. C.) 72 Fed. 371.

[60] Terrell v. Allison, 21 Wall. 289, 22 L. Ed. 634.

[61] ROOT v. WOOLWORTH, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123.

[62] Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151.

SAME—REOPENING OF DECREE.

172. Decrees may be reopened on motion, by petition for rehearing, and by bill of review, according to the nature of the grounds on which application is made.

Equity rule 85 permits the correction of clerical errors in decrees at any time before they are actually enrolled, when the matter is brought to the attention of the court by petition, and in such case a rehearing is not necessary.

Equity rule 88 provides for the case of special rehearings, and is as follows: "Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." [63]

It is not sufficient merely to file a petition during the term named by the above rule. Some action upon the petition must be taken by the court in order to preserve the rights of the parties.[64]

Motion.

Under some circumstances, decrees may be reopened on motion. For instance, if the judge has been deceived by counsel into entering an order which he did not intend to enter, it may be set aside on motion.[65]

This method may also be resorted to for the purpose of in-

[63] MOELLE v. SHERWOOD, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350.

[64] Graham v. Swayne, 109 Fed. 366, 48 C. C. A. 411.

[65] U. S. v. Williams, 67 Fed. 384, 14 C. C. A. 440.

troducing new evidence where the circumstances of the case permit such introduction.[66]

But such motion will usually not be entertained after the close of the term.[67]

Bill of Review.

A common method of avoiding the effect of final decrees is by bill of review. This method, however, only lies for substantial error of law apparent on the face of the record, or for new matter arising since the entry of the decree, or for newly discovered evidence which could not have been found and produced by the use of reasonable diligence before the entry of the decree.[68]

It is a well-established rule of the federal courts that a bill of review for errors of law will not lie at any time after the period prescribed for an appeal, for the reason that there must be some finality to litigation, and the adoption of the statutory limitations in regard to appeals furnishes a good point at which to draw the line.[69]

The above rules in relation to reopening decrees relate, of course, to final decrees. Interlocutory decrees are always considered in the breast of the court.

[66] Campbell Printing-Press & Mfg. Co. v. Marden (C. C.) 70 Fed. 339.

[67] McGregor v. Trust Co., 104 Fed. 709, 44 C. C. A. 146.

[68] Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 56; Pittsburg, C., C. & St. L. Ry. Co. v. Bridge Co., 107 Fed. 781, 46 C. C. A. 639.

[69] Blythe Co. v. Hinckley, 111 Fed. 827, 49 C. C. A. 647; Chamberlin v. Railway Co., 118 Fed. 32, 55 C. C. A. 54.

CHAPTER XX.

APPELLATE JURISDICTION—THE CIRCUIT COURT OF APPEALS.

173. The Appellate Courts.
174. The Circuit Court of Appeals—Its Organization.
175. Jurisdiction of the Circuit Court of Appeals.
176. Same—Cases Excepted from the Jurisdiction of the Circuit Court of Appeals.
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THE APPELLATE COURTS.

173. The federal appellate jurisdiction is vested in the Supreme Court of the United States and the circuit courts of appeals for the various circuits, and is divided between the latter class and the Supreme Court in accordance with regulations fixed by law.

THE APPELLATE JURISDICTION AND ITS DISTRIBUTION AMONG THE APPELLATE COURTS.

(1) *Original Organization.*

Until 1891 the appellate jurisdiction of the federal courts —leaving out of view the courts of local interest, like those of the District of Columbia—was vested in the circuit court and in the Supreme Court. The appellate jurisdiction of the former was restricted to a few special classes of cases, while that of the latter constituted the great mass of litigation that found its way into the federal courts. This system worked satisfactorily until the beginning of the Civil War. Up to that time a small limit as to amount was all that was necessary to enable the Supreme Court to handle all the appellate business which had been entrusted to it. There were many cases, how-

ever, as to which there was no appeal at all—some of them of great importance, like criminal cases.

The great growth of the country, and especially the increasing importance of the federal courts due to the new questions springing out of the Civil War, brought it to pass at its close that the Supreme Court could not attend to the appellate jurisdiction which had been conferred upon it. Long delays became inevitable, with all their attendant inconvenience to the litigants. This delay was the subject of much discussion, and many plans of relief, but nothing definite was accomplished until 1875, when an attempt was made to relieve the Supreme Court by raising the limit necessary in appeals to five thousand dollars, instead of two thousand, as had been the previous amount. This temporary expedient, however, failed of its purpose, for not only had the volume of litigation immensely increased, but its character. The result was that the Supreme Court, in spite of its struggles against the ever accumulating mass of appeals, found itself hopelessly in arrears, so that it required from three to five years to secure a hearing of an appeal. This was offering a premium to delays, and put it in the power of litigants to force disadvantageous compromises on the successful party, or keep him out of the fruits of his litigation, even in cases where the appeal had no merit. The discussion of the proper measure of relief continued, but resulted in nothing tangible until 1891.

(2) *Present Organization.*

By the act of March 3, 1891,[1] the whole system of appeals was remodeled, the jurisdiction formerly vested in the appellate courts redistributed, and appeals given in classes where before no appeal was available. The object of the act is well expressed in the case of American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.[2] In it the Supreme Court said: "The primary object of this act, well known as a matter of public

[1] 26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 547].
[2] 148 U. S. 372, 382, 13 Sup. Ct. 758, 37 L. Ed. 486.

history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and of controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States. * * * The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the circuit court of appeals, and making the judgments of that court final, except in extraordinary cases."

The scheme of this act was to establish in each judicial circuit a local appellate court, to be called the United States circuit court of appeals of that circuit, and to distribute the appellate jurisdiction between these local courts and the Supreme Court; conferring upon the former the great mass of ordinary litigation, and reserving for the latter questions of general or national interest, with certain provisions intended to prevent divergence of decisions in the different circuits.

THE CIRCUIT COURT OF APPEALS—ITS ORGANIZATION.

174. Every judicial circuit has an appellate court called the Circuit Court of Appeals. The judges who may hold this court are the Supreme Court justice for the particular circuit, the circuit judges for the circuit, and the district judges for the circuit when the circuit justice or circuit judges cannot sit; any two of these judges constituting a quorum. But no judge who sat on the trial court for the original trial of a cause or question can sit on the appellate court for the trial of the appeal in that cause or question.

Prior to the passage of this act, the judges competent to hold the circuit courts, in addition to the district judges, were the Supreme Court justice assigned to that special circuit, and the circuit judge for that circuit. The act added a new circuit judge to each circuit, on the idea that the court was, in the first instance, to be composed of the circuit justice for that circuit and the two circuit judges of the circuit; but as it was realized that the attendance of the circuit justices would necessarily be very uncertain, and, further, that the circuit judges would be frequently disqualified by reason of having sat in the circuit court, it was also provided that the district judges comprised within that circuit should be competent to sit upon this local appellate court. Two judges, however, constituted a quorum. Thus the court is a very changeable one—a fact which has not been to its advantage, as unity of practice and decision is much harder with a changing court than with one composed all the time of the same members.

The district judges are only called to sit, under the provisions of the third section of the act, when the associate justice and the circuit judges are not all present, and the district judges in such case may be called either by general or particular assignment. The third section, however, expressly provides that no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

In the case of Moran v. Dillingham [8] the Supreme Court strongly intimates that under this provision a judge who has sat in the case is disqualified in the appellate court from hearing the case or any part of it; and, as the object of the act is to furnish an appellate court of judges absolutely uncommitted, this would certainly seem to be its natural construction. However that may be, a judge who has heard the case on its merits cannot sit in the appellate court on any question involved

[8] 174 U. S. 153, 157, 19 Sup. Ct. 620, 43 L. Ed. 930.

in it; and a judge who has heard any single question in the case cannot sit in the appellate court on the hearing of that question, or any other question immediately dependent upon it, and the effect of his so sitting will be that the case will be reversed, regardless of the merits of the decision.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

175. All final decisions of the district or circuit courts, except those special jurisdictional, criminal, international, and constitutional questions intrusted to the Supreme Court, are reviewable in the circuit court of appeals.

The jurisdiction of the circuit court of appeals is defined by the sixth section of the act regulating the federal appellate jurisdiction, which provides as follows: "The circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court, and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in con-

troversy in the same manner as if it had been brought there for review by writ of error or appeal."

No Monetary Amount.

As to the limits of this jurisdiction, it should be observed in the first place that there is no limit as to amount. It was held in one case [4] that the limit of fifty dollars formerly imposed on appeals in equity or admiralty from the district courts applied; but the subsequent case of The Paquete Habana,[5] which reviews the earlier statutes as to the amount required for jurisdiction, holds that there is no monetary limit upon appeals to the circuit court of appeals. The reason of this is obvious. Under the present federal legislation nearly all the litigation in the circuit court has a limitation of $2,000, applicable to the court of first instance, and that limitation is itself sufficiently high for purposes of an appeal. The classes of litigation involving less than that amount are self-corrective, as appeals are not often taken by litigants, on account of the expense, where the amount involved is small.

Subject-Matter.

Now, as to the subject-matter of the appellate jurisdiction, it covers the great mass of litigation; appeals to that court being the rule, and those to the Supreme Court being the exception. It will be observed that the statute above quoted uses the language that the appeal shall exist "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law"; and it has been held that this latter clause was a saving clause intended to keep in force acts contemporaneous with this act or subsequent thereto, and not intended to apply to previous provisions as to appeals, as that construction would nullify the whole act.[6]

[4] North American Trading & Transportation Co. v. Smith, 93 Fed. 7, 35 C. C. A. 183.

[5] 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. See, also, Kirby v. Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911.

[6] Louisville Public Warehouse Co. v. Collector, 49 Fed. 561, 1 C. C. A. 371. The Paquete Habana, 175 U. S. 677, 683, 20 Sup. Ct. 290, 44 L. Ed. 320.

SAME—CASES EXCEPTED FROM THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

176. Jurisdictional, capital, prize, and constitutional questions are intrusted to the Supreme Court, though the circuit court of appeals may acquire cognizance of cases even in these classes when questions included therein are connected in the case with other questions over which the latter court has jurisdiction.

The statute above quoted gives the circuit court of appeals jurisdiction "in all cases other than those provided for in the preceding section of this act"; hence it is necessary, in order to find out its jurisdiction, to name the cases excepted by the "preceding section." This is section 5, and provides as follows:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts, direct to the Supreme Court in the following cases:

"(a) In any case in which the jurisdiction of the court is in issue, in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"(b) From the final sentences and decrees in prize causes.

"(c) In cases of conviction of a capital crime.

"(d) In any case that involves the construction or application of the Constitution of the United States.

"(e) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"(f) In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Thus these two sections distribute the jurisdiction between the circuit courts of appeals and the Supreme Court on the general idea of conferring all the jurisdiction upon the circuit court of appeals, except jurisdictional, constitutional, or international questions, or convictions of capital crimes.

Instances of Cases Cognizable by the Circuit Court of Appeals.

It will be observed that questions of jurisdiction of the trial court are to be taken to the Supreme Court by certificate. The question what constitutes jurisdiction, in the sense of this act, is difficult of definition. Perhaps no clearer illustration can be given than the language of Judge Brown in an admiralty case.[7] In it he said: "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit in rem for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits."

Accordingly he held that the question whether a seaman had a lien upon a vessel for wages accrued while a receiver was operating it, and whether he could assert such lien against the purchaser of the vessel after it had left the custody of the receiver, was not a question of jurisdiction. So, too, the question whether the defendant in an involuntary bankruptcy proceeding was engaged chiefly in farming is not a question of jurisdiction, but a defense going to the merits.[8] So, too, in a proceeding by contempt, the question whether the facts shown made out a case of contempt is a question that went to the merits, and not to the jurisdiction, for the court had admitted jurisdiction over the person and over the subject-matter of contempts.[9] And the jurisdiction alluded to in this act means the jurisdiction in the case from which the appeal is taken, not the jurisdiction in another case out of which this case grew.[10] So, too, it is clear that "jurisdiction" is not synonymous with

[7] The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.

[8] Denver First Nat. Bank v. Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. Ed. 1127.

[9] O'Neal v. U. S., 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945.

[10] Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120.

"authority." For instance, a receiver filed a petition for the settlement of his accounts, and the payment of certain costs and expenses, which petition was denied. The contention that the court had no authority to require him to pay these costs and expenses was held not to be a jurisdictional question.[11]

The jurisdiction referred to in this connection means the jurisdiction of the court as a federal court, not the general jurisdiction of the court as a court.[12] Hence, where the defense to a suit in equity is that the court had no jurisdiction because there was an adequate remedy at law, but there was no question of the jurisdiction as a federal court, it is held that this is not such a question of jurisdiction as goes to the Supreme Court under this fifth section, but the appeal in such case would go to the circuit court of appeals.[13]

Same—Jurisdiction of Circuit Court of Appeals When Jurisdictional Questions Are Involved.

Notwithstanding the provision of section 5 that the appeal shall be taken to the Supreme Court when the jurisdiction of the court is in issue, there are many circumstances under which the circuit court of appeals can consider jurisdictional questions. This must first be discussed in connection with appeals by defendant. Suppose that in such a case the defendant pleads to the jurisdiction, and his plea is decided against him. He cannot then appeal to the Supreme Court, for that would not be a final decree. The court would overrule his plea, and proceed with the case. If it is finally decided against him on the merits, then he has an election either to take the jurisdictional

[11] Chapman v. Trust Co., 119 Fed. 257, 56 C. C. A. 61.

[12] Louisville Trust Co. v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; Bache v. Hunt, 193 U. S. 523, 24 Sup. Ct. 547, 48 L. Ed. 774.

[13] SMITH v. McKAY, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Mexican Cent. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245.

question alone to the Supreme Court, and have it decided there, or to appeal the whole case from the final decree on the merits to the circuit court of appeals. In such case, the latter, having acquired jurisdiction by reason of the appeal of the whole case, can consider the question of jurisdiction of the lower court, for such question is necessarily involved in disposing of the whole case. In such case, however, it may, in its discretion, certify the question of jurisdiction up to the Supreme Court under the clause in the act giving it the right to ask the instruction of the Supreme Court on any question arising in a case, or the Supreme Court itself may issue its writ of certiorari to the circuit court of appeals, and bring up the whole case.[14]

The question of jurisdiction may also be complicated with other questions on appeals by the plaintiff, and under certain circumstances the circuit court of appeals can consider such a question. Suppose the trial court decides that it has no jurisdiction. That is a final decree, and in such case the plaintiff must go straight to the Supreme Court on a certificate of the jurisdictional question. Suppose, on the other hand, that the lower court decides in favor of its jurisdiction; that the case proceeds on its merits, and is decided in favor of the defendant on the merits. In such case the plaintiff takes the whole case to the circuit court of appeals, for he cannot complain of a decision upholding the jurisdiction, and his only ground of complaint is the action of the court on the merits. In such case the circuit court of appeals may, in its discretion, certify the question of jurisdiction to the Supreme Court.

Suppose, again, that the jurisdiction is sustained; that the case goes on to trial, and is finally decided for the plaintiff, but for a less amount than he claims. In such case, if the defendant has taken an appeal to the circuit court of appeals, the plaintiff can take a cross-appeal to the same court. If the defendant has gone to the Supreme Court on the jurisdictional question, the plaintiff can appeal independently to the circuit

[14] McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893; U. S. v. JAHN, 155 U. S. 109, 15 Sup. Ct. 89, 39 L. Ed. 87.

court of appeals; but in such case the latter court will suspend action until the Supreme Court has decided the question of jurisdiction on the defendant's appeal.[15]

It is important to observe, also, that the Supreme Court can consider the question of jurisdiction in such case only on certificate, and, if the case has been taken to the circuit court of appeals, the Supreme Court will not consider an appeal, even though it would otherwise have jurisdiction by virtue of some of the other clauses of section 5, for the policy of the law is in favor of only one appeal, and it will not permit separate appeals to the circuit court of appeals and the Supreme Court.[16]

Same—Course of Appeal when Other Classes of Section 5 Are in Issue.

The only class of the fifth section which requires a certificate taking up a single question is that relating to jurisdiction. In the other classes named, the whole case goes up. Hence the principles which regulate the course of appeal in these cases are a little different from those already discussed. It is clear, in the first place, that if the plaintiff's own pleading shows that the case turned upon any of the questions named in section 5—as, for instance, a federal constitutional question—the appeal must go to the Supreme Court alone.[17] It is, however, frequently the case that the jurisdiction is invoked in the first place on one ground, and that questions of this character subsequently arise. For instance, suppose the plaintiff bases his right of suit in the first instance in his pleadings on the ground of diverse citizenship. In such case, under section 6, the circuit

[15] U. S. v. JAHN, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Anglo-American Provision Co. v. Provision Co., 191 U. S. 376, 24 Sup. Ct. 98, 48 L. Ed. 228.

[16] ROBINSON v. CALDWELL, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745.

[17] Union & Planters' Bank v. Memphis, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. Ed. 712; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.

court of appeals, if that were the only question involved, would have final jurisdiction. But suppose the defendant in such case raises a federal constitutional question in his plea or answer, or such a question arises in some subsequent stage of the case. Under such circumstances, the case could be taken to the circuit court of appeals, because the original ground of jurisdiction was diverse citizenship, or it could be taken first to the Supreme Court, if this subsequent question was a pivotal question in the case, but the litigant cannot do both, one appeal being his limit.[18] If, however, the question is a different one from those enumerated in section 5—as, for instance, a case turning upon conflicting state land grants—the appeal is to the circuit court of appeals alone.[19] But if the jurisdiction in the first instance was not based solely on diverse citizenship, the decision in the circuit court of appeals is not final.[20] If the constitutional question on which the jurisdiction of the trial court is invoked is decided in plaintiff's favor, but the main case against him, he must appeal to the circuit court of appeals, not to the Supreme Court, for an appeal by him in such case would involve no constitutional question.[21]

[18] American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; HUGULEY MFG. CO. v. COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546; Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314; Keyser v. Lowell, 117 Fed. 400, 54 C. C. A. 574; Watkins v. King, 118 Fed. 524, 55 C. C. A. 290.

[19] Ayres v. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196, 47 L. Ed. 314.

[20] HUGULEY MFG. CO. v. COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546; Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.

[21] Anglo-American Provision Co. v. Provision Co., 191 U. S. 376, 24 Sup. Ct. 93, 48 L. Ed. 228.

SAME—INSTANCES OF THE JURISDICTION.

177. The following are important instances in which the circuit court of appeals exercises appellate jurisdiction:

(a) Certain jurisdictional questions.

(b) Certain constitutional or treaty questions not jurisdictional, named in the act of March 3, 1891.

(c) Criminal cases not capital.

(d) Habeas corpus cases.

(e) Bankruptcy cases.

(f) Claims against the United States.

(g) Suits by the United States.

(h) Interstate Commerce Commission cases.

(i) Appraiser's decisions.

(j) Decisions of territorial courts.

(k) Cases depending on diverse citizenship.

(l) Cases involving patent laws.

(m) Cases involving revenue laws.

(n) Admiralty cases.

In any of the above named instances the appeal may be to the Supreme Court of the United States when any of the questions mentioned in section 5 of the act of March 3, 1891, is involved in the case.

In bankruptcy matters the circuit court of appeals has a general supervisory appellate jurisdiction over the lower courts in matters of law. It has appellate jurisdiction by appeal or writ of error

(a) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

(b) From a judgment granting or denying a discharge;

(c) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

Jurisdiction over Criminal Cases.

The act, as originally drawn, gave jurisdiction both over cases of conviction of capital crimes and of infamous offenses. This was amended by the act of January 20, 1897.[22] In these cases the only method of reviewing the decision of the trial

[22] 29 Stat. 492, c. 68 [U. S. Comp. St. 1901, p. 556].

court is by writ of error, and the only questions reviewable are questions of law.[23]

The test of jurisdiction in this case is the judgment of conviction. If the accused is convicted of a capital crime, the case goes to the Supreme Court, and the circuit court of appeals has no jurisdiction, even though, as a matter of fact, the death sentence was not imposed.[24] For the same reason, the offense charged is not the test. Hence, if the indictment is for conspiracy, involving a charge of murder in aggravation, but the conviction is of conspiracy only, the circuit court of appeals has jurisdiction.[25]

Appeals in Habeas Corpus Cases.

Under sections 763 and 764 of the Revised Statutes,[26] the appeal from a district court decision in a habeas corpus case went to the circuit court, and the appeal from a circuit court decision went to the Supreme Court. By the act of March 3, 1891, as has been seen, the appellate jurisdiction of the circuit court was abolished; and consequently appeals in habeas corpus cases, both from the district court and the circuit court, go, as a rule, to the circuit court of appeals. In such cases pending in the district court, an appeal would lie not only from an order of the court, but also from an order of the judge at chambers.[27] But where the appeal is from a case pending in the circuit court, it only lies from an order of the court, and not from an order of the judge at chambers.[28] The reason of this difference is the different language of sections 763 and 764.

But while, as stated above, appeals in habeas corpus cases, in the absence of special grounds of jurisdiction, go to the circuit

[23] Bucklin v. U. S., 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304.

[24] Good Shot v. U. S., 104 Fed. 257, 43 C. C. A. 525; Id., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101.

[25] Davis v. U. S., 107 Fed. 753, 46 C. C. A. 619.

[26] U. S. Comp. St. 1901, pp. 594, 595.

[27] U. S. v. Fowkes, 53 Fed. 13, 3 C. C. A. 394; Webb v. York, 74 Fed. 753, 21 C. C. A. 65.

[28] Ex parte Jacobi (C. C.) 104 Fed. 681.

court of appeals, they would go to the Supreme Court if the case turned on any one of the classes set forth in section 5 of the act of March 3, 1891, above quoted; that is, cases involving jurisdictional questions, certain criminal questions, and certain federal questions. The result of this is that many of these cases necessarily go to the Supreme Court, for the classes of habeas corpus cases of which federal courts have jurisdiction are composed largely of cases involving such questions, as will be seen by reference to section 753 of the Revised Statutes.[29]

Appeals in Bankruptcy.

Quite an extensive jurisdiction is vested in the circuit court of appeals by virtue of the provisions of the bankrupt law. Sections 24 and 25 of that act [30] provide as follows:

"Sec. 24 (a) The Supreme Court of the United States, the circuit courts of appeals of the United States and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia.

"(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such

[29] U. S. Comp. St. 1901, p. 592; Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896; Ex parte Lennon, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; Craemer v. State, 168 U. S. 124, 18 Sup. Ct. 1, 42 L. Ed. 407; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938.

[30] U. S. Comp. St. 1901, pp. 3431, 3442.

power shall be exercised on due notice and petition by any party aggrieved.

"Sec. 25 (a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit:

"(1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt;

"(2) From a judgment granting or denying a discharge; and

"(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. * * *"

Same—Supervisory Review.

It will be seen from these sections that there are two methods of reviewing the action of the lower court in the circuit court of appeals—one by the last paragraph of section 24, which is an informal supervisory power of review, and the other under the provisions of section 25, which is a formal appeal in the limited cases therein specified.

Considering the supervisory power first, it appears that only matters of law can be reviewed under this proceeding.[81] In such cases the decision of the circuit court of appeals is final, subject only to the issue of a certiorari provided by the act of March 3, 1891.[82] This right of supervision, however, extends only to bankruptcy proceedings proper.[83] A plenary suit by the trustee against third parties is not such an order of ad-

[81] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; IN RE EGGERT, 102 Fed. 735, 43 C. C. A. 1.

[82] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

[83] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

ministration, but is a separate suit, and is not reviewable by this process.[34] On the other hand, a claim of a third party against a fund in the hands of a trustee is a bankruptcy matter, and is reviewable as far as any legal questions are involved.[35] So, too, an order entered by the bankruptcy court on petition of a creditor to sell the bankrupt's homestead is reviewable as an administration order.[36]

The "proceedings of the several inferior courts of bankruptcy within their jurisdiction" mean the proceedings of the district courts within the territorial jurisdiction of the corresponding Circuit Court of Appeals.[37]

As illustrations of the legal questions reviewable, it has been held that an order requiring a bankrupt to transfer a liquor license, which is transferable, with the consent of certain governmental authorities, under the state law, can be reviewed as to questions of law in this proceeding.[38] So a claim of ownership to funds in trustee's hands is reviewable as to matters of law.[39]

Where the question involved is close on the border line between the cases reviewable under this section and the cases appealable under the next section, the party may take both proceedings, and the appellate court will act upon the one which it considers the proper one.[40] The question whether a creditor can amend his specifications in opposition to the bankrupt's discharge is reviewable under this provision.[41] As to the form of such a petition, it should state the question involved, and be

[34] In re Rusch, 116 Fed. 270, 53 C. C. A. 631.

[35] Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248.

[36] Ingram v. Wilson, 125 Fed. 913, 60 C. C. A. 618.

[37] In re Seebold, 105 Fed. 910, 45 C. C. A. 117.

[38] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

[39] Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159; Same v. Otis, 115 Fed. 937, 53 C. C. A. 419; Id., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

[40] In re Worcester Co., 102 Fed. 808, 42 C. C. A. 637.

[41] In re Carley, 117 Fed. 130, 55 C. C. A. 146.

accompanied by enough of the record in the case to show how it arose and was determined.[42]

Such petition should be filed in the circuit court of appeals, and cannot be allowed, nor the proceeding matured, by the district judge.[43]

Same—Procedure by Appeal or Writ of Error.

Although the language of section 25 speaks simply of appeals, the Supreme Court has held that a writ of error is proper when the proceeding appealed from in its nature should be taken up by such a writ, and the thirty-seventh* bankruptcy order expressly provides: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. * * *"

Accordingly, when the procedure has involved a jury trial, as is authorized by some provisions of the bankrupt law, it necessarily follows that there must be bills of exceptions, and that such a case shall be taken to the circuit court of appeals, not by appeal, but by writ of error.[44]

The appealable cases in section 25 are, as appears from the quotation above, only three in number. The first of these is from a judgment adjudging or refusing to adjudge the defendant a bankrupt.[45]

The second is from a judgment granting or denying a dis-

[42] Courier Journal Job Printing Co. v. Brewing Co., 101 Fed. 699, 41 C. C. A. 614.

[43] In re Williams (D. C.) 105 Fed. 906.

* 89 Fed. xiv, 32 C. C. A. xxxvi.

[44] Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666; ELLIOTT v TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

[45] ELLIOTT v. TOEPPNER, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

charge. The case of In re Adler [46] holds that under this provision an appeal from an order refusing to confirm or confirming a composition will not lie; but in the case of U. S. v. Hammond [47] the contrary opinion was reached, on the ground that the action of the court in that particular settled the question of discharge, and this seems to be based on better reason. The usual presumptions in favor of the action of an inferior court prevail on such appeals. Where a discharge has been refused on the ground of fraud, the error must be manifest before there will be a reversal.[48]

The third and much the most usual class of appeals is from judgments allowing or rejecting a debt or claim of five hundred dollars or over. This means a money demand, not a demand for specific property.[49]

If the only question about the debt was its priority, and not its validity, the procedure would have to be by review; [50] but, when an appeal is taken from the allowance or rejection of such a claim, the court can, as incidental to that appeal, consider the question of rank or lien.[51]

The appeal may be taken by the trustee from an order denying his motion to expunge a claim.[52] In one case [53] it was held that any party affected, including a creditor whose dividend was diminished, could take an appeal; but the better opinion is that the trustee represents the creditors in such a matter, and that only he can take such an appeal, the remedy of objecting creditors being an application to the court to require an appeal by the trustee.[54] The right of appeal under

[46] (D. C.) 103 Fed. 444.

[47] 104 Fed. 862, 44 C. C. A. 229.

[48] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158.

[49] In re Whitener, 105 Fed. 180, 44 C. C. A. 434; HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

[50] In re Worcester Co., 102 Fed. 808, 42 C. C. A. 637.

[51] Cunningham v. Insurance Bank, 103 Fed. 932, 43 C. C. A. 377; Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179.

[52] Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154.

[53] In re Roche, 101 Fed. 956, 42 C. C. A. 115.

[54] Chatfield v. O'Dwyer, 101 Fed. 797, 42 C. C. A. 30; Foreman v. Burleigh, 109 Fed. 313, 48 C. C. A. 376.

this section does not exist in contests over an insurance policy claimed to be exempt, as that is not one of the enumerated classes.[55]

Same—Claims against the United States under the Tucker Act of March 3, 1887, Authorizing Suits against the United States.

In the classes therein enumerated, the course of appeal is to the circuit court of appeals, unless one of the questions named in section 5 of the act of March 3, 1891, exists, in which case it goes to the Supreme Court.[56]

This question has been touched upon in the chapter which discusses the jurisdiction of the courts in suits against the United States, to which reference is made.[57]

Suits by the United States.

Appeals in these cases also go to the circuit court of appeals. In U. S. v. American Bell Telephone Co.,[58] which was a suit to cancel a patent, the Supreme Court held that the circuit court of appeals had appellate jurisdiction over such a case, though its decision would not be final, as the fact that the United States were parties gave another independent ground of jurisdiction, and prevented the case from turning simply upon the question that it was a suit under the patent laws. It was held in the same case that a suit to cancel a patent was not a suit under the patent laws in the sense in which it was used in section 6 of the act of March 3, 1891.

Interstate Commerce Commission Cases.

Appeals by parties aggrieved under the provisions of this act also go to the circuit court of appeals, in the absence of any special grounds of jurisdiction in the Supreme Court.[59]

[55] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

[56] U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556; U. S. v. Coudert, 73 Fed. 505, 19 C. C. A. 543; Coudert v. U. S., 175 U. S. 178, 20 Sup. Ct. 56, 44 L. Ed. 122.

[57] Ante, c. 9.

[58] 159 U. S. 548, 16 Sup. Ct. 69, 40 L. Ed. 255.

[59] Interstate Commerce Commission v. Railroad Co., 149 U. S. 264,

Appeals from Decisions of Circuit Court Reviewing Decisions of Appraisers under Act of June 10, 1890.

These cases go to the circuit court of appeals.[60]

Appeals from Territorial Courts.

The fifteenth section of the act of March 3, 1891,[61] provides as follows: "That the circuit court of appeal, in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several territories as by this act they may have to review the judgments, orders and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court to be made from time to time, be assigned to particular circuits."

It will be seen, in connection with the jurisdiction of the Supreme Court, that it also has cognizance of many appeals from the supreme courts of the territories. But in the cases where the decisions of the circuit courts of appeals, if taken up from the district or circuit courts, would be final, the appeal would lie to the circuit courts of appeals. Appeals, however, from the territorial courts in cases of conviction of capital crimes, would not go to the circuit courts of appeals.[62]

13 Sup. Ct. 837, 37 L. Ed. 727; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

[60] Louisville Public Warehouse Co. v. Collector, 49 Fed. 561, 1 C. C. A. 371; U. S. v. Hopewell, 51 Fed. 798, 2 C. C. A. 510; Same v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Anglo-Californian Bank v. U. S., 175 U. S. 37, 20 Sup. Ct. 19, 44 L. Ed. 64.

[61] U. S. Comp. St. 1901, p. 554.

[62] Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363.

SAME—CASES IN WHICH THE DECISION OF THE CIRCUIT COURT OF APPEALS IS FINAL.

178. The decision of the circuit court of appeals is final in the following classes of cases on appeal:

(a) Cases depending on diverse citizenship.

(b) Cases involving patent laws.

(c) Cases involving revenue Laws.

(d) Criminal cases.

(e) Admiralty cases.

Even in the above classes of cases, however, the appeal may be to the Supreme Court of the United States when any of the questions mentioned in the fifth section of the act of March 3, 1891, are involved.

These are enumerated in section 6 of the act of March 3, 1891.[63] These cases are as follows: "In which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases."

If, however, the pleadings show that the ground on which the case is based and on which it turned was a federal question, but not one of those enumerated in the fifth section, then the decision of the circuit court of appeals is not final.[64] But the mere fact that such a federal question might have been raised does not prevent the decision of the circuit court of appeals from being final when it was not actually raised.[65]

If frequently happens that jurisdiction would vest in the trial court in the first instance by reason of the fact of diverse citizenship, and that constitutional questions subsequently arise in the case. Under these circumstances, if the court acquired

[63] U. S. Comp. St. 1901, p. 550.

[64] FLORIDA CENT. & P. R. CO. v. BELL, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486.

[65] World's Columbian Exposition v. U. S., 56 Fed. 654, 6 C. C. A. 58.

jurisdiction originally on the ground of diverse citizenship alone, an appeal will certainly lie to the circuit court of appeals; and, if such an appeal is taken, the decision of that court is final.[66]

The Supreme Court also, however, would have jurisdiction if a constitutional question should subsequently arise, even though the jurisdiction originally vested on the ground of diverse citizenship, for it could not have been the intent of Congress to deprive it of the right to pass upon such a question. The only qualification is that the litigant cannot take appeals to both courts.[67] A suit by a national bank against a citizen of another state depends on diverse citizenship, and the decision of the circuit court of appeals is final in such case.[68]

Patent Cases.

This is one of the class in which the decision of the circuit court of appeals is made final, but the simple fact that a patent may come before the court in litigation does not make the case a patent case under such circumstances. The cases included in this description have been described by the Supreme Court as follows: "Actions at law for infringement, and suits in equity for infringement, for interference, and to obtain patents, are suits which clearly arise under the patent laws; being brought for the purpose of vindicating rights created by those laws, and coming strictly within the avowed purpose

[66] Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030; Pope v. Railroad Co., 173 U. S. 573, 19 Sup. Ct. 500, 43 L. Ed. 814; American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; Keyser v. Lowell, 117 Fed. 400, 54 C. C. A. 574; Spencer v. Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287.

[67] Cincinnati, H. & D. Ry. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911; American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859.

[68] CONTINENTAL NAT. BANK v. BUFORD, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. Ed. 119.

of the act to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases, and that the language was used as applicable only to them." [69]

Accordingly it was held in the case from which the above quotation is taken that a suit by the United States to cancel a patent as improperly issued was not a suit "arising under the patent laws," in the sense of this act. So, too, a suit to enjoin the collection of a state tax on a patent right was not a suit under the patent laws, but was a suit involving the validity of a state statute, and hence the appeal should be to the Supreme Court, and not to the circuit court of appeals.[70]

Revenue Laws.

In this class of cases, also, the decision of the circuit court of appeals is made final. A revenue law is defined by the Supreme Court as a law imposing duties on imposts or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by section 8, art. 1, of the Constitution, "to lay and collect taxes, duties, imposts, and excises." [71] The decision of the circuit court reviewing the action of a board of appraisers under the act of June 10, 1890, is reviewable by the circuit court of appeals as a revenue law, and the judgment of the latter court in such case is final.[72]

[69] U. S. v. Telephone Co., 159 U. S. 548, 553, 554, 16 Sup. Ct. 69, 40 L. Ed. 255.

[70] Holt v. Indiana Mfg. Co., 80 Fed. 1, 25 C. C. A. 301; Id., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374.

[71] U. S. v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275. Compare Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496, and U. S. v. Norton, 91 U. S. 566, 23 L. Ed. 454.

[72] U. S. v. Hopewell, 51 Fed. 798, 2 C. C. A. 510; SAME v. JAHN, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Anglo-Californian Bank v. U. S., 175 U. S. 37, 20 Sup. Ct. 19, 44 L. Ed. 64.

Criminal Laws.

In these cases, too, the decision of the circuit court of appeals is final. A proceeding by contempt is so far criminal that the Supreme Court has no jurisdiction of it, and the decision of the circuit court of appeals is final.[73]

It has been held by the Supreme Court that this method of review in criminal cases superseded the old provision allowing the judges of the circuit court, where two sat in the trial, to certify up to the Supreme Court questions of law wherein they differed in opinion; this right being limited under the former law to certifying simply questions of law.[74]

Admiralty Cases.

Here, too, the decision of the circuit court of appeals is final. In this respect an appeal from the decision of the court in the ordinary questions arising out of limited liability proceedings is an admiralty case reviewable only by the circuit court of appeals.[75] But when a jurisdictional question arises, either in a limited liability case or any other admiralty case, then the appeal goes to the Supreme Court, under the fifth section of the act.[76]

In reference to all the classes of cases discussed in this connection, as cases in which the decision of the circuit court of appeals is final, it must be borne constantly in mind that in these, as in all other decisions of the circuit court of appeals, the Supreme Court may obtain jurisdiction either to review special questions arising, in case the circuit court of appeals certifies such questions up to it, or to decide the whole case, if, when such questions are certified up, it thinks proper to require the whole record to be sent to it, or if, independent of

[73] O'Neal v. U. S., 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945.

[74] U. S. v. Rider, 163 U. S. 132, 16 Sup. Ct. 983, 41 L. Ed. 101; U. S. v. Hewecker, 164 U. S. 46, 17 Sup. Ct. 18, 41 L. Ed. 345.

[75] Oregon R. & Nav. Co. v. Balfour, 179 U. S. 55, 21 Sup. Ct. 28, 45 L. Ed. 82.

[76] The Alliance, 70 Fed. 273, 17 C. C. A. 124; The Annie Faxon, 87 Fed. 961, 31 C. C. A. 325; The Presto, 93 Fed. 522, 35 C. C. A. 394.

any such certificate from the circuit court of appeals, it decides on application for a certiorari to bring the whole case up by that process.

SAME—POWER OF CIRCUIT COURT OF APPEALS TO ISSUE AUXILIARY WRITS.

179. The circuit court of appeals can issue auxiliary writs only incidentally to cases pending in it.

The twelfth section of the act provides that the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.[77]

Section 716, referred to in this clause, reads as follows: "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." [78]

Under this provision, however, it has been uniformly held that the circuit court of appeals has no power to issue any of these writs as independent proceedings, but only as incidental to a case regularly brought before it by appeal or writ of error. For instance, in U. S. v. Severens,[79] the issue of a mandamus was refused where no case was pending in the court; and in U. S. v. Judges of United States Court of Appeals [80] it was held that such a writ could not be used in lieu of an appeal, but only in aid of a jurisdiction already acquired. Nor will this court issue a certiorari as an original process.[81] The same conclusion was reached as to the issue of a writ of prohibition.[82]

[77] U. S. Comp. St. 1901, p. 553.
[78] U. S. Comp. St. 1901, p. 580.
[79] 71 Fed. 768, 18 C. C. A. 314.
[80] 85 Fed. 177, 29 C. C. A. 78.
[81] Travis Co. v. Manufacturing Co., 92 Fed. 690, 34 C. C. A. 620.
[82] IN RE PAQUET, 114 Fed. 437, 52 C. C. A. 239.

CHAPTER XXI.

APPELLATE JURISDICTION (Continued)—THE SUPREME COURT.

180. The Supreme Court of the United States—Its Organization.
181. The Appellate Jurisdiction of the Supreme Court—The Courts whose Decisions are Reviewable by the Supreme Court.
182. Appeals from the United States District and Circuit Courts.
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192. Same—By Whom the Right of Review may be Invoked.
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THE SUPREME COURT OF THE UNITED STATES—ITS ORGANIZATION.

180. The Supreme Court of the United States is the court exercising the highest powers of appellate jurisdiction; this jurisdiction comprising certain appeals from all of the other federal courts and from the state courts of last resort, according to regulations fixed by law.

The Supreme Court consists of a chief justice of the United States and eight associate justices, any six of whom constitute a quorum.

The judges of the Supreme Court are appointed by the President of the United States, and hold office during their lifetime. Under the chief justice, the associate justices take precedence according to the dates of their commissions, or, if their commissions are dated alike, according to their ages.

In another connection the original jurisdiction of the Supreme court has been discussed. It is now necessary to consider this great court in connection with its appellate jurisdiction, which is far the most extensive body of law which it administers.

Composition of the Supreme Court.

Section 673 of the Revised Statutes [1] provides: "The Supreme Court of the United States shall consist of a chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

Under its original organization, the court was composed of only seven justices, but this number was afterwards increased to nine, the present number. Under section 674, the associate justices take precedence according to the dates of their commissions; if their commissions are dated alike, according to their ages.

Sessions of the Supreme Court.

It is provided by section 684 of the Revised Statutes [2] that the court shall hold one term annually at the seat of government, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business. In actual practice, on account of the pressure of business upon it, the court is in practically continuous session from October until the early part of the following May; only adjourning occasionally, and using even those adjournments for the purpose of writing up opinions in cases argued and submitted.

Appellate Jurisdiction of the Supreme Court—Sources and Regulation of.

The second paragraph of the second section of article 3 of the Constitution provides:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the

[1] U. S. Comp. St. 1901, p. 558. [2] U. S. Comp. St. 1901, p. 563.

other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

From this it appears that the original jurisdiction of the Supreme Court springs directly from the Constitution, but its appellate jurisdiction is subject to regulation by Congress.[8]

THE APPELLATE JURISDICTION OF THE SUPREME COURT—THE COURTS WHOSE DECISIONS ARE REVIEWABLE BY THE SUPREME COURT.

181. The Courts whose decisions are reviewable by the Supreme Court of the United States under regulations fixed by law are:

(a) The United States district and circuit courts.
(b) The United States circuit courts of appeals.
(c) The territorial courts.
(d) The courts of the District of Columbia.
(e) The court of claims.
(f) The court of private land claims.
(g) State courts of last resort.

APPEALS FROM THE UNITED STATES DISTRICT AND CIRCUIT COURTS.

182. The Supreme Court exercises appellate jurisdiction directly over the district and circuit courts of the United States in the following cases:

(a) When jurisdictional questions are involved.
(b) Prize causes.
(c) Capital criminal causes.
(d) Constitutional or treaty questions, comprehending:
  (1) The construction or application of the federal Constitution;
  (2) The Constitutionality of a federal law;
  (3) The validity or construction of a treaty;
  (4) The constitutionality of a state law.
(e) Prosecutions for obstructions to navigation by bridges.
(f) Suits by the United States under anti-trust legislation.

[8] National Exch. Bank v. Peters, 144 U. S. 570, 12 Sup. Ct. 767, 36 L. Ed. 545.

The main mass of litigation in these courts is reviewable, as has already been seen, by the circuit court of appeals, and the jurisdiction of the Supreme Court is the exception, and not the rule; but under section 5 of the appellate court act quoted in the previous chapter, the Supreme Court has jurisdiction over the decisions of the district and circuit courts in exceptional cases of general importance. This jurisdiction is so important that this fifth section of the act may well bear repetition. It is as follows: "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases, the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. From cases of conviction of a capital crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question. In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases."

(*a*) *Jurisdictional Questions.*

The first paragraph of the above-recited act requires the appeal to go straight to the Supreme Court where the jurisdiction of the lower court is in issue, but in such case the court can only consider the question of jurisdiction, and not the case on the merits. In this respect this first class of cases differs from all the subsequent ones. In order to give the Supreme Court jurisdiction over such a question, there must be a certificate of the court accompanying the appeal or writ of error, and without such certificate the court has no power to review

even a question of jurisdiction.[4] This certificate must be made by the lower court during the term at which final judgment is rendered, and cannot be made at a subsequent term.[5] There is no specific form which this certificate must follow. It should be, in the main, similar to the old form adopted by the courts when certifying to the Supreme Court particular questions or propositions of law wherein they differed in opinion.[6] In no event can the Supreme Court be required, even where the case turned on a jurisdictional question, to search through the record and exhume it from a great mass of pleadings or rulings.[7] At the same time, there is no magic in the mere use of the word "certified," but anything which may present to the appellate court the single, well-defined question of jurisdiction, severed from all collateral questions, will be sufficient. For instance, in one case the parties who had obtained a receiver in a state court applied to a federal court to discharge a receiver which the latter court had appointed; claiming that the state court had first obtained jurisdiction over the subject-matter, and that its receiver was in prior possession. The federal court refused to discharge its receiver, and from this order an appeal was taken. The petition for an appeal set out the action of the lower court, and prayed for an appeal from the order taking and exercising jurisdiction; and the federal judge, in allowing the appeal, expressly stated in the order that it was granted solely upon the question of jurisdiction. The Supreme Court held this sufficient, using the following language: "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration

[4] ROBINSON v. CALDWELL, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745.

[5] COLVIN v. JACKSONVILLE, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053. This case contains a good form of certificate of a jurisdictional question.

[6] Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353, 38 L. Ed. 179.

[7] Van Wagenen v. Sewall, 160 U. S. 369, 16 Sup. Ct. 370, 40 L. Ed. 460.

that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of, the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single, definite question of jurisdiction. And that is here shown. The petition for an appeal is upon the single ground that the court wrongfully took possession of the property, because it was then in the possession of the state court, and in the order allowing the appeal it is explicitly stated that this appeal is granted solely upon the question of jurisdiction, and the court at the same time reserved to itself the right, which it subsequently exercised, of determining what portions of the proceedings should be incorporated into the record sent here for the purpose of presenting this question." [8]

In another case the court says: "The record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill, and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and the question of jurisdiction be certified to the Supreme Court, and that such appeal was allowed. The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the case for want of jurisdiction was denied. It therefore appears that the appeal was granted solely upon the question of jurisdiction." [9]

[8] Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660.
[9] SMITH v. McKAY, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731.

In another case [10] the record showed that there was a plea to the jurisdiction in the lower court on the ground that the suit was a collusive attempt to confer upon the federal court a jurisdiction not conferred upon it by law. The judgment of the court recited these pleas, the replications thereto, an agreed statement of facts, the recital that the court decided against the jurisdiction, the opinion of the court, and also a bill of exceptions reciting the ruling of the court on the jurisdictional point, and the exception thereto. The order allowing the writ of error also recited the ruling of the court on the question of jurisdiction, and allowed the appeal. It was held that this was a sufficient certificate of the question of jurisdiction.

In another case [11] the record showed that the only matter which had been tried in the lower court was a demurrer to a plea to the jurisdiction; that the decision of the court on that issue was against the jurisdiction, and dismissed the case; and the petition for the allowance of an appeal simply prayed for a review of the judgment holding that the court had no jurisdiction of the case, on which petition the writ of error was allowed. This also was held a sufficient certificate under the statute.

In another case [12] the court had dismissed the action as not

[10] In re Lehigh Min. & Mfg. Co., 156 U. S. 322, 15 Sup. Ct. 375, 39 L. Ed. 438.

[11] Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401.

[12] Huntington v. Laidley, 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630. The following was the certificate in this case: "A final decree having been entered herein, on the 25th day of June, 1898, dismissing this bill and the bill and amended bills therein: Now, therefore, this court, in pursuance of the second paragraph of the fifth section of the act of Congress approved March 3, 1891, and entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' hereby certifies to the Supreme Court of the United States for decision the question of jurisdiction alone of this court over this cause as follows: Is this court without

involving a controversy within the cognizance of the federal courts, and this appeared clearly on the face of the record. The petition for appeal alleged that the plaintiff was aggrieved by the decree dismissing the suit on the ground of want of jurisdiction, because of the pendency of a suit in the state court begun prior to the commencement of this cause, and the order provided that the appeal be allowed "as prayed for." The Supreme Court held that the allowance of appeal in this form was sufficient, under these circumstances, independent of the fact that the certificate itself was also sufficient.

In another case [13] the decree and the allowance of the appeal both showed that the only question in issue was jurisdiction. The court held that no separate certificate was necessary.

On the other hand, if the jurisdictional question appears in the record, not as the sole question passed upon, but only as one of many, and the order allowing the writ of error was in general terms, not specifying this single question of jurisdiction, that would not be a sufficient certificate, and the court would not take cognizance of the case under such circumstances.[14]

So, too, where the record of the case showed that it had turned, not upon a jurisdictional question, but upon the merits, even a certificate not presenting a clear-cut, single jurisdictional

jurisdiction of this cause because of the pendency in the state court, prior to the commencement of this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Co. of West Va. was defendant, which was begun in the circuit court of Cabell Co., West Va., on the first Monday in April, 1882, and of the other actions in ejectment brought prior to this cause in said state court by the said John B. Laidley as plaintiff in relation to the property in question in this suit, and of the chancery cause in which the Central Land Co. of West Va. was complainant and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause?"

[13] Excelsior Wooden Pipe Co. v. Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910.

[14] CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510.

question would not give the court power to review. The case in which this principle was announced was a habeas corpus case in a district court in which the writ was issued to a county sheriff, and was prayed on the ground that the party confined under an indictment of a state court was acting at the time as a special agent of the general land office in the Department of the Interior of the United States. The court certified the following questions to the Supreme Court as questions of jurisdiction:

(1) Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence county, Ark., for the matters and things and under the circumstances set out in the record in this cause.

(2) Whether the proper order of this court, under the facts, should have been to remand said petitioner to the custody of the said sheriff of Independence county, Ark., to be dealt with by the Independence circuit court of the state, or to discharge him from said custody.

The Supreme Court held that this certificate was not sufficiently definite to be considered a certificate of a jurisdictional question—especially in connection with the fact that the record in the case did not show that any such question had arisen.[15] The petition for the appeal cannot take the place of such a certificate when it merely stated in general terms that the court acted without jurisdiction, but did not specify the special jurisdictional question arising, and the judge allowed the appeal generally in the form used when entire records are taken up. In such case, even a more definite statement of a jurisdictional question in the assignment of errors will not help.[16]

The questions which are considered jurisdictional in this connection have been discussed to some extent in the previous

[15] Arkansas v. Schlierholz, 179 U. S. 598, 21 Sup. Ct. 229, 45 L. Ed. 335.

[16] The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. Ed. 305.

chapter. The jurisdiction meant is the jurisdiction in the case from which the appeal is taken, not the jurisdiction in a former case questioned by the latter case. For instance, where a suit is brought, questioning the validity of a foreclosure proceeding in a former suit, the jurisdiction of the court in this former suit cannot be considered.[17] And the question whether a suit against a state officer is in effect a suit against a state, is not a jurisdictional, but a constitutional, question, and cannot be considered under this clause of the statute.[18] On the other hand, the question whether the court ever obtained jurisdiction over the defendant by a valid service of process is a question of the jurisdiction which can be certified up.[19] Under some circumstances, the Supreme Court can consider on appeals based on jurisdictional questions, not only matters of law, but matters of fact; as, for instance, in an action of ejectment, where the court had held on affidavits that the value of the land involved was less than two thousand dollars, the Supreme Court reviewed this finding on the facts, and reversed it.[20]

(*b*) *Prize Causes.*

The fifth section requires appeals to go direct to the Supreme Court "from the final sentences and decrees in prize causes." The reason of this is the international character of the question involved. Hence, where the question of international law was whether an unarmed fishing vessel not going knowingly to a blockaded port was a lawful prize, the question was taken to the Supreme Court.[21]

[17] Carey v. Railway Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041.

[18] Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410.

[19] SHEPARD v. ADAMS, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602.

[20] Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682.

[21] The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

(*c*) *Capital Crimes.*

The fifth section also requires a direct resort to the Supreme Court "in cases of conviction of a capital crime." In crimes of this character, all necessary orders, bail, and writs to mature the appellate process may be acted upon by any Supreme Court justice, not simply by the justice assigned to the special circuit where the case arose.[22]

It has been seen in connection with the jurisdiction of the circuit court of appeals that the question turns upon the fact that there is a conviction of a capital crime, although in fact capital punishment cannot be imposed by reason of a recommendation of the jury to mercy.[23]

(*d*) *Constitutional or Treaty Questions.*

The fifth section requires a direct resort to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

"In any case in which the Constitution or law of the state is claimed to be in contravention of the Constitution of the United States."

Here there is a striking difference in the policy of the act between this class of cases and the class involving simply jurisdictional questions. In the latter, only the jurisdictional question is certified, but in these constitutional or international questions the whole case goes up, and not simply the constitutional or international question that may be involved. If such a question was raised on allegations so false and fictitious as to practically amount to bad faith, or on propositions so bald as to be self-destructive, the court would probably not take jurisdiction; but, if the question raised is bona fide and colorable, the court will consider the whole

[22] Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424.

[23] Goodshot v. U. S., 104 Fed. 257, 43 C. C. A. 525; Id., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101.

case, although it should, in making such decision, hold that the constitutional question on account of which the case was taken up was not sustainable. On this point the Supreme Court has expressed itself as follows:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition 'that the Constitution or a law of the state of Texas conflicts with appellant's contract, and contravenes the federal Constitution—in other words, it must affirmatively appear upon the face of complainant's bill that there was involved in this case a federal question, the determination of which was essential to a correct decision of the case'; but the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is a result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court under the act of 1891 to review by direct appeal the final action of the Circuit Court, where on the face of the record it appears that the claim was made that the

statute of a state contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record." [24]

In order to give jurisdiction in this class of questions, it must clearly appear that the question was actually raised and passed on. It is not only necessary that a title, right, privilege, or immunity is claimed under the Constitution, where the appeal is based on the ground that the construction or application of the Constitution is involved, but a definite issue in respect to the possession of the right must be distinctly deducible from the record. Hence, although the plaintiff stated in his complaint that he would rely upon certain treaty provisions and upon the fifth amendment to the federal Constitution, but there was nothing to show that the question actually arose in the case, the court declined to take jurisdiction.[25]

A general exception to an instruction, not stating that it was objected to on the ground that a constitutional question was involved, is not sufficient to make the record show such a question; and, as it must appear from the record of the court of original jurisdiction, it is equally clear that an assignment of errors cannot be used for the purpose of grafting upon the record such a question for the first time.[26] On the other hand, the Supreme Court would have jurisdiction, although the question was raised for the first time by the defendant's pleading, as by demurrer; the principle being different in this case from the rule that the original jurisdiction of a federal court, as based on a federal question, must appear from the

[24] PENN MUT. LIFE INS. CO. v. AUSTIN, 168 U. S. 685, 694, 695, 18 Sup. Ct. 223, 42 L. Ed. 626. See, also, Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Field v. Paving Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

[25] Muse v. Hotel Co., 168 U. S. 430, 18 Sup. Ct. 109, 42 L. Ed. 531.

[26] Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911.

plaintiff's statement of his own case, as has been discussed in a previous connection.[27] It makes no difference which of the two parties appeals. The court has jurisdiction in either case, if such a question is involved. For instance, in Loeb v. Columbia Tp.[28] the federal question was raised by the defendant's demurrer and decided in his favor, and the plaintiff was the appellant. On the other hand, in Connolly v. Union Sewer Pipe Co.[29] the constitutional question was raised by the plaintiff, sustained by the court, and appealed by defendant. In both cases the court held that it had jurisdiction.[30]

CASES INCLUDED IN THIS CLASS.

(1) *"In Any Case That Involves the Construction or Application of the Constitution of the United States."*

In order to give jurisdiction under this heading, the constitutional question must be directly involved, and must be a controlling question in the case.[31]

Notwithstanding the broad language of this statute, it was not intended to change the long-established principle of criminal law that no appeal lies on behalf of the government. Hence in criminal cases the United States cannot appeal, even though a constitutional question is involved.[32] But despite the act of January 20, 1897,[33] the defendant can take any criminal case, capital or not, to the Supreme Court, that involves a constitutional question.[34]

[27] Loeb v. Township, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; Lampasas v. Bell, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527; ante c. 10.

[28] 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280.

[29] 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

[30] See, also, Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 24 Sup. Ct. 489, 48 L. Ed. 749.

[31] Carey v. Railway Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041.

[32] U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445.

[33] 29 Stat. 492, c. 68 [U. S. Comp. St. 1901, p. 556].

[34] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

Mere irregularities in judicial proceedings which can be corrected by review are not considered as constitutional questions. For instance, the allegation that a decree of court deprived the plaintiff of his property without due process of law is not such a question.[35] So the allegation that the action of the court in directing a verdict deprived the litigant of the right of trial by jury is not a constitutional question.[36]

So the question whether process was served on a state agent of a foreign corporation in accordance with the state statute regulating it was not a constitutional question.[37] So, too, the question whether parties were collusively joined for the purpose of conferring jurisdiction on a federal court.[38] On the other hand, a constitutional question was held to be involved when a collector of internal revenue refused to file in a state court copies of papers in his office which he was forbidden by federal regulations to divulge, in consequence of which he was committed for contempt by the state court, and a proceeding by habeas corpus was based thereon.[39] So, too, a constitutional question was involved when the trial court admitted, against the prisoner's objection, the written testimony that a witness had given at the examining trial; the allegation being that this deprived the accused of the constitutional right of being confronted with the witnesses against him.[40]

The right to vote for members of Congress being a right claimed under the federal Constitution, a suit against the state election officers for refusing a vote involves a constitutional question.[41]

The right to build a dock in navigable waters, which was

[35] Carey v. Railway, 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041.

[36] Treat Mfg. Co. v. Iron Co., 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853.

[37] Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 24 Sup. Ct. 489, 48 L. Ed. 749.

[38] Merritt v. College, 169 U. S. 551, 18 Sup. Ct. 415, 42 L. Ed. 850.

[39] Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846.

[40] MOTES v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

[41] Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84.

claimed under certain acts of Congress and a permit from the Secretary of War, and which was disputed, involves a constitutional question.[42]

(2) *"In Any Case in Which the Constitutionality of Any Law of the United States * * * is Drawn in Question."*

It is important to observe here that this class of jurisdiction in the Supreme Court only applies where the constitutionality of the federal statute is questioned. A mere question of construction under a federal statute does not come within this class.[43] It will thus be seen that there are many federal questions of which the federal trial courts have jurisdiction, but which do not fall within this class—such as questions involving the mere construction of a federal statute, and not its validity. Such cases cannot go by direct appeal from the courts of original jurisdiction to the Supreme Court, but it will be seen, in discussing the jurisdiction of the Supreme Court over cases from the circuit courts of appeals, that the decision of the circuit courts of appeals is not final in such cases, and that, therefore, if they involve a sufficient amount, they can be taken to the Supreme Court from that court. But wherever the validity of a federal statute is questioned, the appeal lies directly to the Supreme Court.[44]

(3) *"In Any Case in Which * * * the Validity or Construction of Any Treaty Made Under Its Authority is Drawn in Question."*

Here, too, it must appear that the validity or construction of a treaty was actually involved or passed upon.[45] Where

[42] Cummings v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525.

[43] Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.

[44] Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266 (involving the constitutionality of section 3894 of the Revised Statutes, forbidding the use of the mails for lotteries); CHAPPELL v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510 (involving the validity of a federal condemnation act).

[45] Muse v. Hotel Co., 168 U. S. 430, 18 Sup. Ct. 109, 42 L. Ed. 531.

a treaty comes before the court only in an incidental way, as part of the history of a case, or as relevant to some main issue involved, this is not sufficient to confer jurisdiction on the Supreme Court under this section.[46] But where the construction of the treaty is necessary for the decision, although it may be connected with other questions in the case, the Supreme Court has jurisdiction.[47]

(4) *"In Any Case in Which the Constitution or Law of a State is Claimed to be in Contravention of the Constitution of the United States."*

It has always been the policy of Congress to make the Supreme Court the final arbiter of questions of this character, it being the only class in which an appeal lies from a state court to a federal court, as will be seen hereafter.

But such right of review of the inferior federal courts of original jurisdiction by the Supreme Court can be invoked only by the party actually affected. For instance, a city cannot set up that an act extending boundaries deprives residents of the outlying territory of their property without due process when the parties themselves have made no complaint.[48] And the Supreme Court has the right to review the entire case under this section, even though the lower court has certified a question up as a jurisdictional question, for it is not in the power of the lower court to narrow the jurisdiction of the Supreme Court by such a certificate.[49]

One of the most numerous classes of cases involving the validity of state legislation is where such legislation is claimed to impair the obligation of a contract.[50] The question whether

[46] Borgmeyer v. Idler, 159 U. S. 408, 16 Sup. Ct. 34, 40 L. Ed. 199; Sloan v. U. S., 193 U. S. 614, 24 Sup. Ct. 570, 48 L. Ed. 814; The Pilot, 53 Fed. 11, 3 C. C. A. 392.

[47] Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; Mitchell v. Furman, 180 U. S. 402, 21 Sup. Ct. 430, 45 L. Ed. 596; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 658, 48 L. Ed. 938.

[48] Lampasas v. Bell, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527.

[49] Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909.

[50] PENN MUT. LIFE INS. CO. v. AUSTIN, 168 U. S. 685, 18 Sup.

state legislation denies the equal protection of the laws has also been the subject of many such cases.[51] The language of all these subdivisions to section 5 clearly gives an appeal to the Supreme Court only from such proceedings in court as would constitute a case, and not from proceedings of a mere administrative character which happen to be vested in a district court.[52] And in all these cases the Supreme Court has jurisdiction regardless of the amount involved.[53]

(*e*) *Prosecutions for Obstructions to Navigation by Bridges.*

Under the eighteenth section of the act of March 3, 1899, in relation to rivers and harbors, power is given to the Secretary of War, acting through the district attorney, to institute criminal proceedings against parties constructing bridges in such a way as to constitute an unreasonable obstruction to free navigation. It makes such act on the part of the person so obstructing the navigation a misdemeanor punishable by fine, if he does not remove the obstruction within a certain time after notice. It provides that an appeal from any case arising under the provisions of this section may be taken direct to the Supreme Court, either by the United States or by the defendants.[54]

(*f*) *Suits by the United States under the Anti-Trust Acts.*

The act of February 11, 1903,[55] provides in its second section that any suit in equity brought under the anti-trust acts

Ct. 223, 42 L. Ed. 626; Pikes Peak Power Co. v. Colorado Springs, 105 Fed. 1, 44 C. C. A. 333; Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410.

[51] Connolly v. Sewer Pipe Co., 184 U. S 540, 22 Sup. Ct. 431, 46 L. Ed. 679; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.

[52] PACIFIC STEAM WHALING CO. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253.

[53] Kirby v. Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911.

[54] 30 Stat. 1153 [U. S. Comp. St. 1901, p. 3545].

[55] 32 Stat. 823, c. 544 [U. S. Comp. St. Supp. 1903, p. 377].

wherein the United States is complainant, may be taken direct to the Supreme Court.[56]

APPEALS FROM THE CIRCUIT COURTS OF APPEALS.

183. The Supreme Court exercises appellate jurisdiction over the circuit court of appeals:

(a) By certificate from the circuit court of appeals when the judges of that court desire to certify a question to the Supreme Court for its decision.

(b) By writ of certiorari from the Supreme Court to the circuit court of appeals when the judges of the Supreme Court desire to review in the highest court the decision of some question of great importance.

(c) By appeal or writ of error in all cases in which the decision of the circuit court of appeals is not final.

(d) In certain cases under the bankrupt act.

The first paragraph of the sixth section of the act of March 3, 1891, provides as follows:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning

[56] NORTHERN SECURITIES CO. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

which it desires the instruction of the court for its proper decision, and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

(*a*) *Review on Certificate.*

Under this paragraph, the first method in which the Supreme Court can acquire jurisdiction to review cases in the circuit courts of appeals is by a certificate from the latter court, the object of which is to present to the Supreme Court definite, clear-cut propositions of law.

There is some ambiguity whether this certificate can be issued in any case of which the circuit court of appeals has jurisdiction, or only in those cases of which it has final jurisdiction. The more natural construction of the words "in every such subject within its appellate jurisdiction," which precede the provision as to the certificate, would seem, however, to be that they allude to the appellate jurisdiction to review by appeal or writ of error all the decisions of the district and circuit courts except those provided for by the fifth section, and that the words above quoted qualify this first part of the section, and not simply the part immediately preceding them, which specify the cases of final jurisdiction. The object of the certificate will apply to both alike, and it is not only more natural to suppose that the circuit courts of appeals could certify questions up from all cases in its jurisdiction than to suppose that they were limited; but this view is also strengthened by the fact that, in the subsequent paragraph relating to the right of the Supreme Court to issue a certiorari, that is expressly limited to cases made final, thus drawing a distinction between the cases going up by a certificate and cases brought up by certiorari.

limits are well expressed
an opinion of Mr. Jus-

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was to vest final juris-
the courts then created;
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the courts of appeals do not transmit the whole case to us for consideration." [57]

The form of this certificate is prescribed by rule 37* of the United States Supreme Court, which makes the following requirements:

"Where under section 6 of the said act a circuit court of appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises."

The Supreme Court has repeatedly held that this certificate should present separate, independent propositions of law, and show that the court desired instruction upon such questions, and that it could not be used for certifying up questions involving an examination of the entire record, although the Supreme Court may, if it desires, require the whole record to be sent up, but that must be the act of the Supreme Court, not of the circuit court of appeals.[58]

The Supreme Court has also said that a good analogy to follow in the framework of these certificates is the old certificate of division of opinion, in use before these more recent provisions regulating appeals.[59]

The issuing of this certificate is entirely discretionary with the circuit court of appeals, and it should issue only before a decision in the case, and when the court entertains a real doubt.[60]

[57] WARNER v. NEW ORLEANS, 167 U. S. 474, 475, 17 Sup. Ct. 892, 42 L. Ed. 239.

*11 Sup. Ct. iv.

[58] Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct. 594, 37 L. Ed. 445; Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259, 13 Sup. Ct. 840, 37 L. Ed. 225.

[59] Graver v. Faurot, 162 U. S. 435, 16 Sup. Ct. 799, 40 L. Ed. 1030; Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042; Felsenheld v. U. S., 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085.

[60] Louisiana, N. A. & C. R. Co. v. Pope, 74 Fed. 1, 20 C. C. A. 253;

The facts to be embodied in such a certificate are not mere matters of evidence, but the ultimate facts necessary for a right understanding of the question involved.[61] The cases referred to in the footnote to this sentence contain forms of such certificate which may be useful in the preparation of similar certificates.[62]

(*b*) *Review by Certiorari.*

The second paragraph of section 6, immediately following the part above quoted, reads as follows:

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require by certiorari or otherwise any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

It is clear from the language of this paragraph that the Supreme Court can issue a certiorari to the circuit court of appeals only in the cases "hereinbefore made final"; that is, in the cases named in that same sixth section as final. This power of the Supreme Court is intended for use only in exceptional circumstances. It has been issued only in questions of gravity and general importance, or in cases where it was necessary to settle a conflict of decision between inferior courts.[62] It has been issued in several admiralty cases involving ques-

Andrews v. Pipe Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153; National Foundry & Pipe Works v. Supply Co., 183 U. S. 216, 225, 22 Sup. Ct. 111, 46 L. Ed. 157; German Ins. Co. v. Hearne, 118 Fed. 134, 55 C. C. A. 84.

[61] Sigafus v. Porter, 85 Fed. 689, 29 C. C. A. 391.

[62] New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Folsom v. U. S., 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363; U. S. v. Harsha, 172 U. S. 567, 19 Sup. Ct. 294, 43 L. Ed. 556; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 20 Sup. Ct. 822, 44 L. Ed. 911.

[63] Ex parte Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868; Columbus Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct.

tions arising out of the international rules of navigation, and in questions arising out of treaties, on account of the international character of these questions. It has been refused, however, on questions of mere local law—as, for instance, the question whether the law of master and servant was properly applied in a particular case.[64] It may be issued even before a final decree in the circuit court of appeals, if the case is an exceptional one, but it is issued in such cases with great reluctance.[65] It will not be issued in a case where the circuit court of appeals itself had no jurisdiction.[66]

As the statute expressly provides that such a case, when certified, goes to the Supreme Court, with the same power and authority in the case as if it had been carried by appeal or writ of error, it follows that only errors complained of by the petitioner can be considered by the Supreme Court, and that the party who has applied for the writ cannot complain of any errors against him.[67]

When issued to a circuit court of appeals, after a second appeal to the circuit court of appeals from the trial court, it brings up the entire case.[68] No limitation is expressly provided for the time when this writ may issue, but it has been held that the court will apply the limitation of one year to direct appeals from the circuit court of appeals by analogy, and the writ will issue even though the circuit court of appeals has already sent its mandate down to the lower court.[69]

It is an interesting question whether the Supreme Court can

594, 37 L. Ed. 445; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup Ct. 665, 41 L. Ed. 1095.

[64] In re Woods, 143 U. S. 202, 12 Sup. Ct. 417, 36 L. Ed. 125.

[65] American Const. Co. v. Railway Co., 148 U. S. 372, 385, 13 Sup. Ct. 758, 37 L. Ed. 486; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095.

[66] Goodshot v. U. S., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101.

[67] Hubbard v. Tod, 171 U. S. 474, 19 Sup. Ct. 14, 43 L. Ed. 246.

[68] Panama R. Co. v. Shipping Co., 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004.

[69] The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937.

issue the writ in any case of which the court of appeals has jurisdiction, and there is some general language in two of its decisions implying that its power to issue the writ is practically coextensive with the appellate jurisdiction of the circuit court of appeals.[70] But the language of the paragraph conferring the right to issue the writ seems very clearly to limit it to those cases "hereinbefore made final"; that is, to cases depending on diverse citizenship, or arising under the patent laws, under the revenue laws, under the criminal laws, and in admiralty cases. Hence important questions pending in a lower court may be out of the reach of the Supreme Court entirely. If they are not included in the class of cases "hereinbefore made final," and involve less than a thousand dollars, they cannot be reached by a certiorari, and they cannot be taken from the circuit court of appeals by direct appeal. If they do not involve any of the questions mentioned in section 5, they could not be taken to the Supreme Court direct from the courts of original jurisdiction. For instance, a civil suit by the United States for an amount less than a thousand dollars would seem to be beyond the reach of the Supreme Court, no matter how important the construction of the statute might be on which the right of recovery would hinge.

(*c*) *By Appeal or Writ of Error.*

The third paragraph of the sixth section, immediately following the paragraph last quoted, reads as follows:

"In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The question what cases are final, and what are not, has

[70] **Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; FORSYTH v. HAMMOND, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095.**

been touched upon in the previous chapter, in connection with the jurisdiction of the circuit court of appeals.

The rules regulating the course of appeal in this class of questions are well summarized in a recent decision of the Supreme Court to the effect that the decision of the circuit court of appeals is final if the jurisdiction of the trial court was first invoked on the ground of diverse citizenship. If, on the other hand, the jurisdiction was first invoked on the ground of diverse citizenship, and a constitutional question subsequently arises, the case can go either to the circuit court of appeals or to the Supreme Court, but not to both. If the jurisdiction of the trial court was invoked both on the ground of diverse citizenship and a federal question (not necessarily a constitutional question), then the jurisdiction of the circuit court of appeals is not final.[71] On the other hand, a decree on a petition of intervention in an equity suit against a receiver for personal injuries is reviewable by the circuit court of appeals where the jurisdiction in the main suit depended on diverse citizenship, but, if an independent common-law suit had been brought against the receiver, then it would not be final, as the jurisdiction in such case would not be based on diverse citizenship.[72] So, too, where the jurisdiction was invoked on the ground of diverse citizenship, but the case was dismissed because the suit was by an assignee in a case where his assignor could not have sued, the decision of the circuit court of appeals was final, for it depended in the first instance on diverse citizenship, even though it did not come within a well-recognized exception.[73]

Where a suit originally depended on diverse citizenship, a federal question is not raised by the charge that a state officer erroneously construed a state law so as to deprive complainants

[71] HUGULEY MFG. CO. v. COTTON MILLS, 184 U. S. 290, 22 Sup. Ct. 452, 46 L. Ed. 546.

[72] Rouse v. Hornsby, 161 U. S. 588, 16 Sup. Ct. 610, 40 L. Ed. 817.

[73] Benjamin v. New Orleans, 169 U. S. 161, 18 Sup. Ct. 298, 42 L. Ed. 700.

of their property without due process of law, and to deny them the equal protection of the laws, for the act complained of in such case is not the state law itself, but the erroneous action of an officer under it.[74]

A suit against a railway for loss of a registered package from the mails by negligence raises no federal question, and, if the trial court acquire jurisdiction by reason of diverse citizenship, the appeal would go to the circuit court of appeals alone.[75] On the other hand, a suit against a corporation claiming its charter by act of Congress involves a federal question, and hence the decision of the circuit court of appeals is not final.[76] So, too, a suit against a marshal for a wrongful attachment raises a federal question, as it involves his official acts, and the decision of the circuit court of appeals is not final.[77] So a suit on a clerk's bond for money paid into court, and not accounted for by him, involving the right of litigants to proceed on such bond.[78] So a suit against a receiver of a national bank, for he is an officer of the United States.[79] So a suit by a foreign state.[80] So a suit in which the ground of jurisdiction was not only diverse citizenship, but an alleged infringement of a trade-mark, for the jurisdiction in such case does not "depend entirely" upon diverse citizenship.[81]

[74] Arbuckle v. Blackburn, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. Ed. 239.

[75] Bankers' Mut. Casualty Co. v. Railway Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484.

[76] Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596; Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003.

[77] Sonnentheil v. Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492.

[78] Howard v. U. S., 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754.

[79] Auten v. Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920.

[80] Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159.

[81] Warner v. Searle & Hereth Co., 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145.

(d) Appeals under the Bankrupt Act.

Section 25 of the bankrupt act provides as follows:

"(b) From any final decision of a court of appeals allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:

"(1) Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

"(2) Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

"(c) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

"(d) Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." [82]

The right of appeal under this section does not go to decrees in revision passing on the mere question of the exemption of an insurance policy, as that does not fall within the classes enumerated.[83] But the right to issue certiorari under the last paragraph applies to decrees in revision as well as to appeals.[84]

[82] U. S. Comp. St. 1901, p. 3432.

[83] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

[84] HOLDEN v. STRATTON, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116.

APPEALS FROM TERRITORIAL COURTS.

184. Appeals from the supreme courts of the territories are taken to the Supreme Court of the United States, provided the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, except in those cases where the circuit courts of appeals have appellate jurisdiction. When the case involves the validity of any patent or copyright, or if the validity of a treaty or statute of, or an authority exercised, under the United States, is drawn in question, the appeal to the Supreme Court is independent of the amount in dispute.

Section 702 of the Revised Statutes, as modified by the act of March 3, 1885,[85] provides for the review of the final judgments and decrees of the Supreme Court of the territories where the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, except that if the case involves the validity of any patent or copyright, or if the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, the review is independent of amount in dispute. This has been impliedly narrowed by the fifteenth section of the act of March 3, 1891, giving the circuit courts of appeals jurisdiction over the judgments of the Supreme Courts of the territories wherever the decisions of such circuit courts of appeals would be final if the appeal had been taken from the district or circuit courts. These cases, as has been seen, would go to the circuit courts of appeals, but all other cases covered by section 702, and the act of March 3, 1885, would go to the Supreme Court.[86] The Supreme Court, however, has not jurisdiction in such case unless the amount involved is over five thousand dollars. For instance, in a suit for divorce, where the only decree is a decree of divorce, it would not have jurisdiction, but, where an allow-

[85] U. S. Comp. St. 1901, pp. 571, 572.

[86] Shute v. Keyser, 149 U. S. 649, 13 Sup. Ct. 960, 37 L. Ed. 884; Aztec Min. Co. v. Ripley, 151 U. S. 79, 14 Sup. Ct. 236, 38 L. Ed. 80.

ance of alimony and counsel fees exceeded five thousand dollars, it would have jurisdiction.[87]

The recent act of April 12, 1900, giving a right of review of the Porto Rico court of last resort, is cognate to this subject of the review of territorial courts.[88] Under this act several cases have already been taken to the Supreme Court.[89] The act of July 1, 1902,[90] gives a review to the Supreme Court of decisions of the supreme court of the Philippines, though it is carefully guarded as to the character of questions involved, and as to the amount.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

185. The act of February 9, 1893,[91] gives the right of review to the Supreme Court over decisions of the court of appeals of the District of Columbia; the pecuniary limit of five thousand dollars, however, applying to all such appeals except those involving the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

Under this provision no appeal lies to the Supreme Court in ordinary criminal cases.[92] However, a suit questioning the validity of a regulation of the Commissioner of Patents draws in question "the validity of an authority exercised under the

[87] Simms v. Simms, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115.

[88] 31 Stat. 85, c. 191.

[89] Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385; Hijo v. U. S., 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994; Crowley v. U. S., 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075.

[90] 32 Stat. 695, c. 1369 [U. S. Comp. St. Supp. 1903, p. 93].

[91] 27 Stat. 436, c. 74 [U. S. Comp. St. 1901, p. 573]. See, also, Act March 3, 1901, c. 854, 31 Stat. 1189.

[92] Chapman v. U. S., 164 U. S. 436, 17 Sup. Ct. 76, 41 L. Ed. 504; Sinclair v. District of Columbia, 192 U. S. 16, 24 Sup. Ct. 212, 48 L. Ed. 322.

United States," and can be taken to the Supreme Court independent of the amount involved.[93]

APPEALS FROM THE COURT OF CLAIMS.

186. Decisions of this court against the United States for more than three thousand dollars, and, in an exceptional case, decisions in favor of the United States are reviewable by the Supreme Court, under sections 707 and 708 of the Revised Statutes.[94]

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

187. Under section 9 of the act of March 3, 1891,[95] decisions of this court are reviewable by the Supreme Court by appeal, in which case the Supreme Court considers questions both of fact and law, and may cause additional testimony to be taken.

REVIEW OF STATE COURT DECISIONS.

188. In order to insure the proper administration of federal laws, the Supreme Court is given jurisdiction to review by writ of error the final decisions of the state court which is the court of last resort in the special instance, in cases involving any question of conflict between state and federal laws or authority, where such decision is against the federal law or authority; that is, in cases involving constitutional questions as to the relative boundaries of state and federal rights.

The right to review decisions of state courts is given by section 709 of the Revised Statutes,[96] which, as last amended, reads as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had where

[93] U. S. v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555.
[94] U. S. Comp. St. 1901, pp. 574, 575.
[95] 26 Stat. 858, c. 539 [U. S. Comp. St. 1901, p. 769].
[96] U. S. Comp. St. 1901, p. 575.

is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ."

This is the famous twenty-fifth section of the judiciary act of 1789. Its validity and policy were not sustained without contest.

SAME—CONSTITUTIONALITY.

189. The right of Congress to give a review to the Supreme Court of decisions of the state courts on federal questions, though once vigorously contested, is settled by decisions.

After exercising this right of review without question in several cases, it was vigorously denied by the supreme court of appeals of Virginia. In a case where its decision was reversed, and where the United States Supreme Court sent down the mandate directing them to enter judgment in accordance with the views of the federal court, the Virginia court refused to

obey the mandate, and entered upon its records an order reciting that it did so because it did not consider that the Constitution authorized Congress to give a right of review of the decisions of the state courts.[97] Thereupon the Supreme Court reviewed the grounds of the refusal of the Virginia court, and decided in favor of the constitutionality of the act.[98] The ground on which the Virginia court denied the validity of the act was that the federal Constitution, properly construed, only authorized the right of review of decisions of federal courts; that the description of the judicial power contained in the Constitution evidently only referred to the jurisdiction of the federal courts; that the states, in the powers reserved to them, were as supreme as the federal government in the powers delegated to it; that the two, therefore, were co-ordinate, and the state courts not inferior, but co-ordinate, to the federal courts. This view, however, was combated, not only in the same case, but in subsequent decisions of the Supreme Court, and must be considered as settled.[99]

[97] Hunter v. Martin, 4 Munf. 1.

[98] Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97.

[99] Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; WILLIAMS v. BRUFFY, 102 U. S. 248, 26 L. Ed. 135. To the student of our political history, the opinion of Judge Roane in the Virginia court of appeals, denying the validity of the act, and the opinion of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257, upholding it, must ever remain models of powerful judicial reasoning; and the opinion of Judge Roane is well worthy, not only from its logical force, but its literary excellence, to be put in the same class with the decisions of the great Chief Justice himself. The opinion of Mr. Justice Story in the case of Martin v. Hunter does not seem, in the judgment of the author, to be equal to either of the others. Certainly, his contention that the federal Constitution required Congress to confer all the judicial power granted by the Constitution upon some courts has not been sustained by the subsequent legal history of our country, as there are many cases of federal jurisdiction which could have been conferred upon the federal court, but have not been.

SAME—THE PROCEEDINGS REVIEWABLE.

190. Any proceeding which is a suit in the state court is reviewable under this provision of law, if it involves any of the questions therein mentioned. It is the object of the act to protect federal constitutional rights, and whether they arise in an ordinary suit, or in an extraordinary proceeding, like habeas corpus or mandamus, provided only they are a court proceeding, they are reviewable.[100]

It has been seen in another connection that there are many court proceedings which are yet not suits at law or in equity, in the sense in which that term is used when discussing the original jurisdiction of the federal courts. That criterion, however, does not apply to these cases in the state courts, and the term is used in a wider sense than in discussing the character of proceedings cognizable in the federal trial courts.[101]

There is no monetary limit to the right of review in these cases, the question itself being of sufficient importance, no matter how small the amount involved; and, as a matter of fact, many of the cases taken to the Supreme Court under this provision have involved very small amounts.[102]

SAME—THE COURTS WHOSE DECISIONS ARE REVIEWABLE.

191. The language of the act is, "The highest court of a state in which a decision in the suit could be had." This means the court having final jurisdiction over the special question, not necessarily the state court of highest rank.

[100] Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271; American Exp. Co. v. Michigan, 177 U. S. 404, 20 Sup. Ct. 695, 44 L. Ed. 823

[101] Cases supra.

[102] Buel v. Van Ness, 8 Wheat. 312, 5 L. Ed. 624; The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L Ed. 320.

It must, however, be a decision of a court, not merely an order of the judge at chambers.[103] It means the last court which could decide the special question,[104] but, where an attempt is made to review under this provision the decision of a court which is not the highest court of the state, it must be shown that this is the court which has final jurisdiction of the special question. If there is a discretionary right of review of such a court by a higher court, the record must show that the party has exhausted his efforts to obtain the benefits of such review before he can take the case up from the lower of the two courts.[105] If an application, however, is made to the highest court of a state for the allowance of an appeal, and that court refuses it, but retains no copy of the record, then the decision should go to the lower court, where the record remains; but if the appellate court acts as a court, and refuses the appeal, and makes an entry of it on its minutes, and retains a copy of the record, then the appeal should go to the higher court.[106]

The writ of error must go to the highest state court, if it has jurisdiction of the matter, even though, as a matter of fact, it is a foregone conclusion that it will act adversely, as in cases of second appeals or questions already settled.[107]

[103] McKnight v. James, 155 U. S. 685, 15 Sup. Ct. 248, 39 L. Ed. 310.

[104] Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673.

[105] Gregory v. McVeigh, 23 Wall. 294, 23 L. Ed. 156; Fisher v. Perkins, 122 U. S. 522, 7 Sup. Ct. 1227, 30 L. Ed. 1192; Mullen v. Beef Co., 173 U. S. 116, 19 Sup. Ct. 404, 43 L. Ed. 635.

[106] POLLEYS v. IMPROVEMENT CO., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938; Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570.

[107] GREAT WESTERN TELEGRAPH CO. v. BURNHAM, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991.

SAME—BY WHOM THE RIGHT OF REVIEW MAY BE INVOKED.

192. Only the party actually injuriously affected by the adverse decision can claim such a right of review, not third parties who would be indirectly interested in an adverse decision of the federal question.[108]

Only a party against whose federal claim the decision is rendered can appeal, not one in whose favor such a decision is made.[109]

SAME—CHARACTER OF QUESTIONS REVIEWABLE.

193. The only questions reviewable under this section are cases of conflicting state and federal rights, viz.:

(a) Cases where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity.

(b) Cases where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

(c) Cases where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

It is manifest, under this statute, that the character of the question decides the right of review, and that the citizenship of the parties has nothing to do with it.[110] It is equally manifest that the questions reviewable in this manner are simply federal constitutional questions—that is, conflicts of state and

[108] Tyler v. Judges, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252.

[109] Ryan v. Thomas, 4 Wall. 603, 18 L. Ed. 460; Rutland R. Co. v. Railroad Co., 159 U. S. 630, 638, 16 Sup. Ct. 113, 40 L. Ed. 284.

[110] French v. Hopkins, 124 U. S. 524, 8 Sup. Ct. 589, 31 L. Ed. 536.

federal authority—and that questions of the conflict of a state statute with a state constitution do not fall under any of these classes.[111] Nor do mere questions of construction, either of the federal or state laws, come under any of these classes, where no question of their validity is involved.[112] Nor are questions of general law thus reviewable.[113] The questions, in order to be reviewable, however, must be sufficiently open to doubt to show that the claim is bona fide and with some color of merit, and not a bare assertion of an obviously unfounded one.[114]

The effect of a proceeding to review the decision of the state courts under this section is simply to bring up federal questions of law. Even in a chancery case only questions of law are reviewable, for the statute expressly provides that the decisions of the state courts are reviewable only by writ of error, and it could not have been the intention to give a general review of all questions of law and fact involved in the case so taken up.[115]

The classes of questions reviewable, as has been seen, subdivide into three. The first of these is where the validity of a treaty or statute or authority exercised under the United States is questioned in the state court; but it must be borne in mind that such a federal statute or authority must be actually drawn in question, and that no review lies from a mere deci-

[111] Kipley v. Illinois, 170 U. S. 182, 18 Sup. Ct. 550, 42 L. Ed. 998; Missouri v. Dockery, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. Ed. 133.

[112] Choteau v. Marguerite, 12 Pet. 507, 9 L. Ed. 1174; Cook Co. v. Dock Co., 138 U. S. 635, 11 Sup. Ct. 435, 34 L. Ed. 1110; Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586.

[113] Grame v. Assurance Co., 112 U. S. 273, 5 Sup. Ct. 150, 28 L. Ed. 716.

[114] New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; Wabash R. Co. v. Flannigan, 192 U. S. 29, 24 Sup. Ct. 224, 48 L. Ed. 328.

[115] Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305; EGAN v. HART, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680; Thayer v. Spratt, 189 U. S. 346, 23 Sup. Ct. 576, 47 L. Ed. 845.

sion of a state court construing a federal statute.[116] Hence it appears that there are many federal questions upon which the state courts can pass, and over which the federal courts have no right of review, such as questions of mere construction, not appearing on the face of the plaintiff's pleading, in which case, as has been seen, no right of removal exists, or questions so appearing in cases involving less than two thousand dollars, or proceedings not amounting to suits, in which cases, also, no right of removal exists.

The second of these classes is where a state statute is questioned in the state court as repugnant to the federal Constitution or laws, and the court sustains the state statute. This is a very common class of jurisdiction. One of the most frequent instances of its exercise is where state laws are alleged to violate the constitutional provisions against impairing the obligation of contracts—a provision applying not simply to the acts of the state legislature, but also to the acts of any subordinate legislative body, like a municipality, but not the acts of executive or judicial officers.[117] Another instance is the question whether the taking of property under a state statute constitutes a taking for public use, or deprives the party of his property without due process of law.[118] The third class, under the statute, is where a title, right, privilege, or immunity is claimed under the federal Constitution or laws, or a commission or authority exercised under the United States, and the decision is against the right specially set up or claimed

[116] Kennard v. Nebraska, 186 U. S. 304, 22 Sup. Ct. 879, 46 L. Ed. 1175.

[117] Williams v. Louisiana, 103 U. S. 637, 26 L. Ed. 595; Citizens' Bank v. Parker, 192 U. S. 73, 24 Sup. Ct. 181, 48 L. Ed. 346; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; New Orleans Waterworks v. Sugar Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132.

[118] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

by either party. This also is a very common exercise of the jurisdiction. It cannot be invoked, however, where both parties set up title through a common source to the United States.[119] It covers, however, not simply questions of validity or construction of the federal Constitution or laws, but also authority exercised under the United States—in this respect being wider than the clause conferring jurisdiction on the trial courts of the United States by removal, where only questions under the Constitution or laws give the right.[120] The question whether a proceeding in a state court put the accused twice in jeopardy, contrary to the provisions of the federal Constitution, raises such a question.[121] The question as to the effect of a sale under the bankrupt law is such a question.[122] So, also, the question whether a party is entitled to a removal of his case from the state court under the provisions of the removal act.[123] So rights or causes of action claimed under the national banking law.[124] So, too, the question whether a carrier who pays duties on imports exacted under a federal statute has a lien against the owner of the goods for reimbursement.[125]

[119] California v. Jackson, 112 U. S. 233, 5 Sup. Ct. 113, 28 L. Ed. 712.

[120] Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992.

[121] Bohanan v. Nebraska, 118 U. S. 231, 6 Sup. Ct. 1049, 30 L. Ed. 71.

[122] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244.

[123] Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61; SOUTHERN RY. CO. v. ALLISON, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078.

[124] McCormick v. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; Talbot v. Bank, 185 U. S. 172, 22 Sup. Ct. 612, 46 L. Ed. 857.

[125] Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

SAME—HOW A FEDERAL QUESTION MUST BE RAISED OR SHOWN BY THE RECORD.

194. In order to avail of the right to review the action of a state court on a federal question, it must be raised in the state court in the manner in which a question of that nature should be raised by the state practice, and the record must show this.

If, for instance, it arises in connection with a question of evidence, and the party in the state court does not seasonably object or take a proper bill of exceptions to the action of the state court, where a bill of exceptions is necessary, and therefore the state Supreme Court decides that the question cannot be considered, because not properly raised, the benefit of the question is lost.[126] It need not necessarily appear in the pleadings, and in fact there are many questions which could not be made to appear by the pleadings, but it must certainly appear somewhere in the record that the point was made and insisted upon. On this subject Chief Justice Fuller has said:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state in which such decision could be had was against the title, right, privilege, or immunity so set up or claimed, and in that regard certain propositions must be regarded as settled:

"(1) That the certificate of the presiding judge of the state court as to the existence of grounds upon which our interposi-

[126] Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33.

tion might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

"(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

"(3) That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment.

"(4) That the petition for the writ of error forms no part of the record upon which action is taken here.

"(5) Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule.

"(6) The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

"(7) Or at all events it must appear from the record by clear and necessary intendment that the federal question was directly involved, so that the state court could not have given judgment without deciding it; that is, a definite issue as to the decision of the right must be distinctly deducible by the record before the state court can be held to have disposed of such federal question by its decision." [127]

The requirement as to the record showing is a little stronger in the third class of questions than in the first two—due to the fact that in the third class it is required by the language of the statute itself that the title, right, privilege, or immunity must be specially set up and claimed. On this point the Supreme Court has said:

"To the argument that the federal right was not specially set up and claimed, in the language of Rev St. § 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases

[127] SAYWARD v. DENNY, 158 U. S. 180, 15 Sup. Ct. 777, 39 L. Ed. 941.

in which the final decree of a state court may be re-examined here:

"(1) Where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity.

"(2) Where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

"(3) Or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed by either party under such Constitution, statute, commission, or authority.

"There is no doubt that under the third class the federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed, to give this court jurisdiction.

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that if the federal question appears in the record, and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against the review of such question here." [128]

The question must be raised before a judgment in the state court, and if of the third class, must, as has been seen, be specially set up.[129] It may be raised by a motion for a new trial

[128] Columbia Water Power Co. v. Power Co., 172 U. S. 475, 19 Sup. Ct. 247, 43 L. Ed. 521.

[129] Yazoo & M. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395; Turner v. Richardson, 180 U. S. 87, 21 Sup. Ct. 295, 45 L. Ed. 438.

and assignment of errors in the state court, if that is not too late under the state practice, especially if the opinion of the state court shows that the question was passed upon.[180] It cannot, however, be raised for the first time in the assignment of errors and petition for a writ of error in the United States Supreme Court.[181] It cannot be raised for the first time by a petition for rehearing in the state appellate court if the petition is refused, but if the state court grants the petition for rehearing, and considers the question, then it is properly in the record for the purposes of review by the United States Supreme Court.[182] It must appear from the record, however, that the case in the state court turned on the federal question, and that it must have been passed upon, not merely that it might have been.[183] If the record shows that the federal question was necessarily involved, so that a decision could not have been rendered without passing upon it, then it is sufficiently involved for the purposes of a review by the United States Supreme Court, even though the opinion of the state court does not show that it was passed upon, or though the state court failed to make an express ruling upon it.[184]

[180] Rothschild v. Knight, 184 U. S. 334, 22 Sup. Ct. 391, 46 L. Ed. 573; San Jose Land & Water Co. v. Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. Ed. 821.

[181] Jacobi v. Alabama, 187 U. S. 133, 23 Sup. Ct. 48, 47 L. Ed. 106; Johnson v. Insurance Co., 187 U. S. 491, 23 Sup. Ct. 194, 47 L. Ed. 273.

[182] Mallett v. North Carolina, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33; Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623.

[183] Detroit City Ry. Co. v. Guthard, 114 U. S. 136, 5 Sup. Ct. 811, 29 L. Ed. 118; New York Cent. & H. R. R. Co. v. New York, 186 U. S. 269, 22 Sup. Ct. 916, 46 L. Ed. 1158.

[184] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Erie R. Co. v. Purdy, 185 U. S. 148, 22 Sup. Ct. 605, 46 L. Ed. 847.

Where there is no opinion filed by the state court, the certificate of the court that a federal question was passed upon will be considered by the Supreme Court in deciding whether such a question was involved.[185]

It is frequently the case that the record in a state court shows not only federal questions, but nonfederal questions as well. If, under these circumstances, the decision of the state court on the nonfederal question is sufficient to dispose of the case without taking the federal question into consideration at all, then no right of review of the case exists in the United States Supreme Court, and it will dismiss a writ of error taken in such a case.[186] The Supreme Court in such a review has jurisdiction, although it may turn out, as the final result, that the federal question claimed was not legally sustainable, for it must have jurisdiction to consider at least the question whether it is sustainable or not.[187]

It appears from the discussion of the various classes of federal jurisdiction heretofore considered that there are three important contingencies under which a federal question can come before the federal courts for decision, and slightly different principles regulate each one of these cases. The first is in connection with the original jurisdiction of the federal trial courts, whether in actions originally instituted in them, or actions taken to them by removal. In these cases a federal question may arise not simply in connection with the federal Constitution, as affecting the validity of a state or federal law, but also in connection with the construction of both the federal Constitution, laws, and treaties. Whenever under them the

[185] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86.

[186] Murdock v. Memphis, 20 Wall. 636, 22 L. Ed. 429; EUSTIS v. BOLLES, 150 U. S. 361, 14 Sup. Ct. 131, 37 L. Ed. 1111; Rutland R. Co. v. Railroad Co., 159 U. S. 630, 16 Sup. Ct. 113, 40 L. Ed. 284; Giles v. Teasley, 193 U. S. 146, 24 Sup. Ct. 359, 48 L. Ed. 655.

[187] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Blythe v. Hinckley, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557.

right of recovery hinges upon the construction or application of the federal Constitution, laws, or treaties, such a question is involved, and the original jurisdiction of the federal court vests, provided the fact that such a question is involved appears upon the plaintiff's pleadings. In this connection, therefore, the term "federal question" is used in its widest sense.[188]

The second class of cases in which federal questions may arise is in connection with the right of appeal from the federal courts of original jurisdiction direct to the Supreme Court. This class of questions, however, are federal constitutional questions, not mere questions of the construction or application of a federal law. They may arise, however, not only when the plaintiff's pleadings show such a question to be involved, but also when set up as a defense in the case, and they may arise in this connection whether the decision is in favor of or against the constitutional right asserted.[189]

The last class of cases is the one which has just been discussed in connection with the right of review of the state court's decisions by the Supreme Court. In this class of cases the question need not necessarily arise by the plaintiff's pleadings, but may arise in subsequent stages of the cause. The court, however, only has jurisdiction in such case where the decision is against the constitutional question asserted, and the questions involved are solely federal constitutional questions, and not questions of mere construction. In this sense, therefore, the term "federal question" has its narrowest meaning.

[188] Ante, p. 203.

[189] Ante, p. 430.

CHAPTER XXII.

PROCEDURE ON ERROR AND APPEAL.

195. Review by the Supreme Court.
196. Same—Writ of Error.
197. Same—Appeal.
198. Same—Other Methods.
199. Review by the Circuit Court of Appeals.
200. Trial in the Appellate Courts.

REVIEW BY THE SUPREME COURT.

195. Review by the Supreme Court of decisions in the cases over which it exercises appellate jurisdiction is had by means of writ of error or appeal, and by certain other methods provided by statute in certain cases.

Only final judgments or decrees can be made the subject of review by writ of error or appeal.

It has been seen by the previous discussion that the appellate courts of the United States of general interest are the Supreme Court and the circuit courts of appeals, and the jurisdiction respectively vested in them has been discussed in the two preceding chapters. It is now necessary to consider the method of invoking that jurisdiction, and bringing and trying cases before them.

The Supreme Court.

The courts to which the right of review of the Supreme Court extends are, in the first place, the district and circuit courts. The time of taking an appeal from these courts is prescribed by section 1008 of the Revised Statutes.[1] It must be within two years after the entry of the judgment, decree, or order which it is desired to review.

It is not every decree or order which can be made the

[1] U. S. Comp. St. 1901, p. 715.

subject of review. Were this not so, there might be an endless number of appeals in any one case; and hence it is a fundamental principle of appellate proceedings, subject to but few exceptions, to be hereafter named, that only final judgments or decrees can be made the subject of appellate review. Thus the case is finally ended in the lower court, and the process of review brings before the appellate court, once and for all, the entire case. The question what constitutes a final judgment is a matter of little difficulty in a common-law proceeding. It is a matter of great difficulty in an equity proceeding. The flexible character of equity causes and the infinite variety of equity decrees render it difficult to define exactly what constitutes a final decree or order in any equity case. The general principle is that a decree is final if it settles the principles of the cause, and leaves only ministerial acts by which its decision is to be carried out; but, although it may settle the main issue in a cause, it is not final if anything is left to the lower court involving the exercise of judicial power, rather than ministerial. On this subject the Supreme Court has said:

"Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from the decrees claimed to be interlocutory, but it has occasionally happened that the power of a court to set aside such a decree at a subsequent term has been the subject of dispute. The cases, it must be conceded, are not altogether harmonious. Upon one hand, it is clear that a decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage. If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold ascertained and defined, it is not final. A like result follows if it merely determines the validity of the mortgage, and, without ordering sale, directs the case to stand continued for further decree upon the coming in of the master's report.

"It is equally well settled that a decree in admiralty deter-

mining the question of liability for a collision or other tort, or in equity establishing the validity of a patent, and referring the case to a master to compute and report the damages, is interlocutory merely.

"It may be said, in general, that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final." [2]

Even if the appeal from the district or circuit court is on a jurisdictional question only, and by certificate, it can still be taken only after a final decree is entered in the cause.[3]

SAME—WRIT OF ERROR.

196. The review is by writ of error in cases of a common-law nature, civil or criminal, which are triable by a jury.

By this method, only errors of law which have been embodied in the record in the manner usual in common-law cases can be reviewed.

The writ of error is a writ of the appellate court to the trial court for the purpose of bringing up the record for review.

[2] McGOURKEY v. RAILWAY, 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079. See, also, Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; Guarantee Co. v. Trust Co., 173 U. S. 582, 19 Sup. Ct. 551, 43 L. Ed. 818.

[3] Bardes v. Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 261; Bowker v. U. S., 186 U. S. 135, 22 Sup. Ct. 802, 46 L. Ed. 1090.

Notice of appeal or the issuance of a writ of error is given to the parties by citation.

Bond satisfactory to the judge issuing the writ or allowing the appeal must be given as a condition of the appeal.

The seventh amendment of the federal Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court in the United States, than according to the rules of the common law."

Pursuant to this constitutional provision, section 1011 of the Revised Statutes [4] provides:

"There shall be no reversal in the Supreme Court or in the circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

Under these provisions, the writ of error performs the office of bringing up for review simply questions of law in cases of common-law nature which are triable by a jury. The question what cases are covered by this constitutional amendment has been discussed at length and learnedly by Mr. Justice Gray in a recent decision of the Supreme Court. He says:

"It must therefore be taken as established, by virtue of the seventh amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States otherwise than according to the rules of the common law of England; that, by the rules of that law, no other mode of re-examination is allowed than upon a new

[4] U. S. Comp. St. 1901, p. 715.

trial, either granted by the court in which the first trial was had, or to which the record was returnable, or ordered by any appellate court for error in law; and therefore that, unless a new trial has been granted in one of these two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States. * * *

"Trial by jury, in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence." [5]

The questions of law which can be examined on writ of error are simply those which appear by the record in a common-law case to have been raised and passed upon by the lower court, or to have been essential to its decision. The record in a common-law case is very different from that in an equity or admiralty case. It contains only the pleadings and orders of court, but not the evidence or the instructions, unless they have been made part of the record by a bill of exceptions. Hence on writ of error only errors of law can be considered which have been embodied in the record in the manner usual in common-law cases.[6] This same principle applies to common-law cases tried and determined by the court after a jury has been waived by the parties. There, too, according to the provisions of section 700 of the Revised Statutes,[7] only those rulings of

[5] CAPITAL TRACTION CO. v. HOF, 174 U. S. 1, 13, 19 Sup. Ct. 580, 43 L. Ed. 873.

[6] St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

[7] U. S. Comp. St. 1901, p. 570.

the court in the progress of the cause which are duly excepted to and presented by a bill of exceptions can be reviewed.[8]

Form and Method of Issue of Writ of Error.

Section 1004 of the Revised Statutes [9] provides as follows:

"Writs of error returnable to the Supreme Court may be issued as well by the clerks of the circuit courts under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the Supreme Court, in pursuance of section 9 of the act of May 8, 1792, chapter 36. * * *"

This writ is the formal method of transferring the record from the inferior to the appellate court for purposes of review. Although most frequently issued by the clerk of the circuit court, it is the writ and process of the Supreme Court commanding the lower court to send up to it for review the record made up as necessary for that purpose. Hence the original writ should be returned to the Supreme Court, whose process it is. On this subject Mr. Justice Miller says:

"We are of opinion that the original writ should always be returned to this court with the transcript of the record. The writ of error is the writ of this court, and not of the circuit court, whose clerk may actually issue it. The early practice was that it could only issue from the office of the clerk of the Supreme Court, and in the case of West v. Barnes, at the August term, 1791, it was so decided. This decision led to the enactment of the ninth section of the act of 1792, by which it was provided that the clerk of the Supreme Court, assisted by any two justices of said court, should prescribe the form of a writ of error, copies of which should be forwarded to the

[8] Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. 249, 21 L. Ed. 827; Town of Martinton v. Fairbanks, 112 U. S. 674, 5 Sup. Ct. 321, 28 L. Ed. 862; Wilson v. Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113.

[9] U. S. Comp. St. 1901, p. 713.

clerks of the circuit courts, and that such writs might be issued by these clerks, under the seals of their respective courts. The form of the writ provided under this act has been in use ever since. It runs in the name of the President, and bears the teste of the chief justice of this court. It is, in form and in fact, the process of this court, directed to the judges of the circuit court, commanding them to return with said writ, into this court, a transcript of the record of the case mentioned in the writ.

"When deposited with the clerk of the court to whose judges it is directed, it is served; and the transcript which the clerk sends here is a return to the writ, and should be accompanied by it." [10]

It is not essential that a writ of error should be allowed by any judge in appeals from one federal court to another, for such appeals are matters of right.[11] The practice, however, has always been to have a writ of error allowed by a judge, and this practice is recognized by rule 36* of the Supreme Court, which provides:

"An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citations signed by him, and he may also grant a supersedeas and stay of execution or of proceeding pending such writ of error or appeal."

[10] MUSSINA v. CAVAZOS, 6 Wall. 355, 18 L. Ed. 810. See, also, Brown v. McConnell, 124 U. S. 489, 490, 491, 8 Sup. Ct. 559, 31 L. Ed. 495.

[11] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377; BARTEMEYER v. IOWA, 14 Wall. 26, 20 L. Ed. 792.

*11 Sup. Ct. iv.

The form of the writ of error in use, and of the citation accompanying the same, can be seen in the case of Worcester v. Georgia.[12]

The Return of the Writ of Error and the Papers Accompanying It.

Section 997 of the Revised Statutes [13] provides as follows:

"There shall be annexed to a return with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

The transcript of the record is regulated by Supreme Court rule 8,† which provides:

"The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case under his hand and the seal of the court.

"In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case."

This certificate to the record is signed by the clerk, and need not be signed by the judge.[14]

The assignment of errors is a very important part of the appellate papers. Although expressly required by statute, the failure to annex an assignment of errors is not fatal to the jurisdiction. The thirty-fifth rule ‡ of the Supreme Court provides as follows:

"Where an appeal or writ of error is taken from a district

[12] 6 Pet. 531, 532, 8 L. Ed. 483.

[13] U. S. Comp. St. 1901, p. 712.

†3 Sup. Ct. vii.

[14] Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483.

‡11 Sup. Ct. iii.

or a circuit court direct to this court, under section 5 of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error and appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, totidem verbis, whether it be in instructions given, or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

In pursuance of the same policy, the twenty-first rule of the Supreme Court requires the counsel for the plaintiff in error or appellant to embody in his brief a specification of the errors relied on practically in the form of an assignment of errors. Under these provisions, the failure to annex the assignment of errors to the transcript itself is not fatal to the jurisdiction, as above stated.[15]

But if there is no assignment of errors in the record, and no proper specification in the brief, the appellate court will dismiss the case, as it is entitled to some assistance from counsel in winnowing out from a large record the pivotal questions.[16]

[15] School District of Ackley v. Hall, 106 U. S. 428, 1 Sup. Ct. 417, 27 L. Ed. 237; U. S. v. Pena, 175 U. S. 500, 20 Sup. Ct. 165, 44 L. Ed. 251.

[16] Benites v. Hampton, 123 U. S. 519, 8 Sup. Ct. 254, 31 L. Ed. 260.

It is customary to file a short petition for the writ of error with the assignment of errors, and to insert in it the prayer for reversal, but it is not essential, and almost any language at all similar would be construed as a prayer for reversal.[17]

The Citation.

It is obvious from the above that the writ of error is not a process intended for the parties to the cause at all. It is intended for the lower court, and is a method of directing that court to send up to the appellate court the proper record. But it is essential that the parties to the cause should also have notice when it is intended to take a case to an appellate court for review. This is accomplished by the citation, which, as seen above, must also be annexed to the record, and service of it upon the opposite party is necessary unless waived. The provision for the citation is contained in section 999 of the Revised Statutes,[18] the conclusion of which is as follows: "When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice. * * *"

This is also provided by Supreme Court rule 36, already quoted.

This paper must be signed by the judge, not by the clerk, being different in this respect from the writ of error.[19] It may be served upon the party or upon his attorney of record.[20] A citation, however, is nothing but an ordinary process, giving a party notice of a new court proceeding, and therefore the ordinary rules as to the service of process apply to it. A general appearance of the party is a waiver of any defects in form or service.[21] It cannot be served by mailing it in the post

[17] MUSSINA v. CAVAZOS, 6 Wall. 355, 18 L. Ed. 810.

[18] U. S. Comp. St. 1901, p. 712.

[19] Chaffee v. Hayward, 20 How. 208, 15 L. Ed. 851.

[20] Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

[21] Chaffee v. Hayward, 20 How. 208, 15 L. Ed. 851; Aldrich v. Insurance Co., 8 Wall. 491, 19 L. Ed. 473.

office, directed to the opposite party or his attorney.[22] In a common-law case taken up by writ of error, the taking of an appeal in open court is not a waiver of the necessity for a citation. This is because a writ of error is not the act of the party, but the act of the court, and differs in this respect from an appeal, in which case, as will be seen, the taking and perfecting of an appeal in open court obviates the necessity for a citation.[23]

The Parties to a Writ of Error.

The only parties who can sue out a writ of error from an obnoxious judgment are parties to the cause.[24] It is also an established principle that, if the judgment is a joint judgment, all the parties jointly interested must unite in suing out the writ of error, and their separate names must be given. It cannot be sued out merely in a firm name.[25]

The reason for this requirement that all the parties must join where the judgment is joint is that otherwise the court could not execute its decree on the parties who refused to join, and such parties might in their turn attempt to review the case also.

But if the other parties interested do not care to appeal, the one who desires to do so can accomplish this purpose by a course equivalent to the old proceeding known as "summons and severance." It is not necessary to follow this old proceeding exactly, but it is sufficient to give written notice to the other parties similarly interested to appear, and to make the record show that they had been so notified, and had refused to join. In this way only can all parties be bound by the action of the appellate court, and the decree dispose of the whole matter in

[22] Tripp v. Railway Co., 144 U. S. 126, 12 Sup. Ct. 655, 36 L. Ed. 371.

[23] U. S. v. Phillips, 121 U. S. 254, 7 Sup. Ct. 874, 30 L. Ed. 914.

[24] Payne v. Niles, 20 How. 219, 15 L. Ed. 895.

[25] Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634; Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437.

controversy. A mere statement in the petition for appeal that it had been done is not sufficient for this purpose.[26]

Method of Suspending the Enforcement of the Judgment.

Section 1000 of the Revised Statutes [27] provides as follows: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

And section 1007 of the Revised Statutes [28] provides as follows: "In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such case, where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days."

The bond required by these statutes must be taken by the judge, and he cannot delegate it to the clerk. The statute implies that the bond must be approved by him, but this approval may be inferred—as, for instance, where it appeared on the face of the bond that the sureties had justified before the

[26] Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Inglehart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76.

[27] U. S. Comp. St. 1901, p. 712.

[28] U. S. Comp. St. 1901, p. 714.

judge.[29] This provision as to the bond is directory only, and not jurisdictional, and the Supreme Court itself may give an opportunity to execute and file a proper bond after the case has been taken there.[30]

The character of bonds to be given is regulated by Supreme Court rule 29,** which reads as follows: "Supersedeas bonds in the circuit court must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, or replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in cases of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and 'just damages for delay,' and costs and interest on the appeal."

Any wording, however, which is practically the equivalent of this, makes the bond good.[31]

The bond should be payable to the defendants in error of record.[32]

A supersedeas under these provisions in a common-law case

[29] Silver v. Ladd, 6 Wall. 440, 18 L. Ed. 828; O'Reilly v. Edrington, 96 U. S. 724, 24 L. Ed. 659; Haskins v. Railway Co., 109 U. S. 107, 3 Sup. Ct. 72, 27 L. Ed. 873.

[30] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377; Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; Stewart v. Masterson, 124 U. S. 493, 8 Sup. Ct. 561, 31 L. Ed. 507.

**3 Sup. Ct. xvi.

[31] Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841.

[32] Davenport v. Fletcher, 16 How. 142, 14 L. Ed. 879.

is only allowed as incident to a writ of error, and cannot be allowed until the writ of error is issued.[83]

The supersedeas is, in its origin and nature, simply intended to stop execution on the judgment rendered in the case appealed from. It cannot prevent the bringing of similar suits or any other action.[84]

SAME—APPEAL.

197. An appeal is a process borrowed from the civil law, and differs from the writ of error, in that it brings up all questions both of law and fact. It is the regular process in all cases not falling under the classification of common-law cases, the most important branches being equity and admiralty cases. A habeas corpus proceeding is also reviewable by appeal, though that is a common-law writ; the statute expressly requiring that it shall be reviewable in this manner.[85]

The Supreme Court has described as follows the difference between an appeal and a writ of error: "An appeal to this court in a proper case is matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking our jurisdiction. A writ of error is a process of this court, and it is issued, therefore, only upon our authority; but an appeal can be taken without any action by this court. All that need be done to get an appeal is for the appellant to cite his adversary in a proper way to appear before this court, and for him to docket the case here at the proper time. Such a citation as is required may be signed by a judge of the circuit court from which the appeal is taken, or by a justice of this court." [86]

[83] Ex parte Ralston, 119 U. S. 613, 7 Sup. Ct. 317, 30 L. Ed. 506.

[84] Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; Natal v. Louisiana, 123 U. S. 516, 8 Sup. Ct. 253, 31 L. Ed. 233.

[85] Rev. St. §§ 763, 765 [U. S. Comp. St. 1901, pp. 594–597].

[86] Brown v. McConnell, 124 U. S. 489, 490, 491, 8 Sup. Ct. 559, 31 L. Ed. 495.

Section 1012 of the Revised Statutes [87] provides as follows: "Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

Under this provision the method of taking an appeal is substantially the same as that already described. There must be a properly authenticated transcript of the record, an assignment of error, and a prayer for reversal. The allowance of an appeal, however, is not of itself a writ, like the issuing of a writ of error by the clerk. It is usually allowed somewhat in the following language, indorsed at the end of the petition and prayer for reversal:

"Appeal allowed as prayed for, bond in the penalty of $.....

.....,

"..... Judge."

How and by Whom Allowed.

Appeals to the Supreme Court from the circuit or district courts are allowed by the same judges who would allow writs of error under similar circumstances, and bonds and other steps necessary in perfecting the appeal are taken and given in the same way. There is, however, one very important difference between perfecting cases by appeal, and perfecting them by writ of error. As has been already seen, a citation is necessary on a writ of error, even though asked in open court during the term at which the judgment complained of was rendered. But when an appeal is taken and perfected in open court, a citation is not necessary, for the appeal differs from the writ of error in being practically the act of the parties instead of the court; and, when taken in open court, all parties are constructively present, and have notice.[88] A citation is necessary, however, even though the appeal is taken in open court, if it

[87] U. S. Comp. St. 1901, p. 716.

[88] Sage v. Railroad Co., 96 U. S. 712, 24 L. Ed. 641; Dodge v. Knowles, 114 U. S. 430, 5 Sup. Ct. 1197, 29 L. Ed. 296.

is not perfected there by giving the necessary bond, for the opposite party is not required to presume that an appeal will be prosecuted, merely from the fact that it is taken.[39] No exact language is necessary in allowing an appeal. In fact, taking security and signing the citation is itself the equivalent of such allowance.[40] The obtaining of a supersedeas does not suspend all decrees. There are some which, from their intrinsic nature, are not suspended by a supersedeas, which is really a common-law writ intended to stay execution on a judgment.

Under these circumstances, the lower court, when an appeal is asked, should be requested to enter some order itself operating as a stay of all proceedings—a request which any court will grant if occasion requires. Its action, however, in granting or refusing such a request is largely discretionary; and the appellate court will not interfere unless in a very plain case, where it is patent that a failure to do so would prevent the appellant from reaping the fruits of his victory, and prevent the appellate court from being able to carry out its decisions.[41] In fact, the Supreme Court, under the powers given it by section 716 of the Revised Statutes,[42] which authorizes it to issue any writs necessary for the protection of its jurisdiction; and the circuit court of appeals, under section 12 of the act of March 3, 1891,[43] giving it the same power, could issue a writ of supersedeas direct for the purpose of protecting a litigant, though the exercise of this power is very rare.[44]

Appeals from the Circuit Court of Appeals.

The time of review by the Supreme Court of decisions of the circuit court of appeals is limited by the concluding para-

[39] Hewitt v. Filbert, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127.

[40] Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989.

[41] Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; Hovey v. McDonald, 109 U. S. 159, 3 Sup. Ct. 136, 27 L. Ed. 888.

[42] U. S. Comp. St. 1901, p. 580.

[43] U. S. Comp. St. 1901, p. 553.

[44] In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657.

graph of the sixth section of the act of March 3, 1891,[45] to one year after the entry of the order sought to be reviewed. Here, too, only final decisions of the circuit court of appeals are reviewable by the Supreme Court. A decision of a circuit court of appeals merely affirming an order which awarded a temporary injunction is not such a final order.[46] A decision of such court directing a circuit court to remand a case to the state court which had been improperly removed is not final.[47] A decision reversing a case and remanding it for a new trial is not a final order.[48] The principle controlling the question whether the decisions of an appellate court are final decisions or not is well expressed by the Supreme Court thus: "A decree, to be final for the purposes of appeal, must leave the case in such a condition that, if there be an affirmance in this court, the court below will have nothing to do but execute the decree it has already entered." [49]

Hence a decree dismissing a bill in equity as to one defendant who had demurred, but leaving the case undisposed of as to other defendants who had answered, though final as to the parties dismissed, is not a final decree in the sense in which it is used in connection with appeals, and an appeal cannot be taken from it until the final disposition of the entire case.

[45] U. S. Comp. St. 1901, p. 550.

[46] KIRWAN v. MURPHY, 170 U. S. 205, 18 Sup. Ct. 592, 42 L. Ed. 1009.

[47] German Nat. Bank v. Speckert, 181 U. S. 405, 21 Sup. Ct. 688, 45 L. Ed. 926.

[48] Montana Min. Co. v. Milling Co., 186 U. S. 24, 22 Sup. Ct. 744, 46 L. Ed. 1039.

[49] Bank of Rondout v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 29 L. Ed. 441. This was an appeal from a decree of a circuit court, but the principle is the same.

SAME—OTHER METHODS.

198. In addition to writ of error and appeal, the law allows reviews of the decisions of the circuit court of appeals in certain cases by means of certificate from that court to the Supreme Court, and by certiorari from the Supreme Court to the circuit court of appeals.

Reviews of the decisions of the territorial and other miscellaneous courts are generally by appeal or writ of error, in accordance with regulations prescribed by law for those cases.

The Different Kinds of Process Used in Taking Cases from Circuit Courts of Appeals to the Supreme Court—Certificate.

The first method used is by certificate. It has been seen that the circuit court of appeals may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. This is the act of the court itself, without any motion for such certificate on the part of the parties; and hence no process or allowance of appeals, or anything of that sort, need be resorted to. The same section goes on to provide that on such certificate the Supreme Court may either give its instruction on the questions and propositions certified, which shall be binding on the circuit court of appeals, or it may require that the whole record in the cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The language of this section would seem to imply that this action on the part of the Supreme Court is also the act of the court, and not of the parties, and requires nothing more than an order of some sort from the Supreme Court to the circuit court of appeals. But the second paragraph of Supreme Court rule 37 provides:

"If application is thereupon made to this court that the whole

record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record."

This rule implies that the Supreme Court will listen to applications by the parties to have the whole record sent up, and it is presumed that in such case they would proceed as if on motion, making the application in the form of a printed motion accompanied by reasons therefor, and furnishing the record as above required, and preferably giving the opposite party notice. There can be no doubt, however, under the language of the statute itself, that the Supreme Court can require the whole record to be sent up to it of its own motion, and without any act of the parties.

Same—Certiorari.

The next process by which cases may be taken from the circuit court of appeals to the Supreme Court is by certiorari. This is provided by the second paragraph of this same section of the act of March 3, 1891. Paragraph 3 of the thirty-seventh Supreme Court rule provides as follows:

"Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant as part of the application."

The method of making this application is the same as the method of making any motion in the Supreme Court. Reasonable notice should be given to the adverse parties. The motion should be printed, including therein the notice and proof of service, and the record should be annexed. No oral argument is permitted, and therefore the motion or petition for the writ should contain a sufficient statement of the case to show the Supreme Court that this extraordinary remedy should be permitted, or, if not in the petition, an independent brief should be filed, showing as briefly as possible the same thing. It is better to refrain in the brief from discussing the questions at issue any more than is necessary to make a prima facie case, for, if

the writ is granted, there will still be opportunity to file an elaborate brief.

In case the litigant thinks when he goes to the circuit court of appeals that his case may eventually go by certiorari to the Supreme Court, it is best to have an extra number of copies of the record printed, so as to use them in the Supreme Court. One would have to be certified as an original record, and the remainder can usually be utilized, for the style, size, and type of records in the circuit court of appeals are about the same as those required by the rules of the Supreme Court.

Same—Writ of Error.

The third method of taking cases from the circuit courts of appeals to the Supreme Court is by writ of error. This takes up the same character of cases that have been described in connection with appeals from the circuit courts. The last part of section 11 of the act of March 3, 1891,[50] provides:

"* * * All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

A writ of error from the Supreme Court to the circuit court of appeals can be issued by the clerk of the circuit court or by the clerk of the Supreme Court. It can be allowed and the citation issued by any judge competent to sit in the circuit court of appeals, or by a justice of the Supreme Court.

[50] U. S. Comp. St. 1901, p. 552.

The fourth method of taking cases from the circuit court of appeals to the Supreme Court is by appeal. Such an appeal can be allowed by any of the judges of either court, and the citation signed by such judges.

Review of Decisions of Territorial Courts.

In those cases of which the Supreme Court has jurisdiction, the review is by writ of error or appeal, according to the nature of the case.[51]

Review of Decisions of the Court of Appeals of the District of Columbia.

The method of review in this case also is by writ of error or appeal.[52] There have been some interesting decisions on appeals from this court in relation to the character of judgments which are final, and, as it is an intermediate court somewhat similar to the circuit courts of appeals, they are of interest and in point in that connection also. For instance, a decision of this court reversing the lower court, and directing the entry of a decree granting an injunction on final hearing, has been held to be a final decree, as it leaves practically nothing to the lower court but the ministerial act of enforcing the decree.[53] On the other hand, a decision reversing the inferior court in a condemnation proceeding, and remanding the case, with instructions to proceed as directed by the act of Congress, is not a final decree.[54]

Review of Decisions of the Court of Claims.

This is by appeal only.[55]

[51] Idaho & O. Land Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433.

[52] U. S. Comp. St. 1901, p. 573.

[53] CHESAPEAKE & POTOMAC TEL. CO. v. MANNING, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144.

[54] Macfarland v. Brown, 187 U. S. 239, 23 Sup. Ct. 105, 47 L. Ed. 159. See, also, Macfarland v. Byrnes, 187 U. S. 246, 23 Sup. Ct. 107, 47 L. Ed. 162.

[55] Rev. St. 707 [U. S. Comp. St. 1901, p. 574].

Review of Decisions of the Court of Private Land Claims.

This, too, is by appeal only.[56]

Review of Decisions of the State Courts—Time of Taking.

Section 1008 of the Revised Statutes [57] prescribes a period of two years for writs of error or appeals from a circuit or district court. Section 1003 [58] provides as follows: "Writs of error from the Supreme Court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Under these two provisions, taken together, the limitation on writs of error to the state courts is two years.

Same—Character of Decisions Reviewable.

Here, too, only final decisions of the state courts are reviewable. A great many decisions have been rendered on the question what constitutes a final decision under such circumstances. The test applied by the Supreme Court is as follows: "The rule is well settled and of long standing that the judgment or decree, to be final, within the meaning of that term in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." [59]

But a decision of a state appellate court reversing a decision of the inferior court which had sustained a demurrer and remanding the case, with instructions to overrule the demurrer and permit the case to proceed, is not a final judgment, although it may adjudicate the principles of the case. In such case it is necessary to let the case proceed in the lower court to

[56] Act March 3, 1891, c. 539, § 9, 26 Stat. 858 [U. S. Comp. St. 1901, p. 769].

[57] U. S. Comp. St. 1901, p. 715.

[58] U. S. Comp. St. 1901, p. 713.

[59] Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73.

final judgment, and then take a new appeal to the state appellate court, even though it is a foregone conclusion that this latter court will not consider questions settled by its first appeal. On its affirmance of the judgment in the second appeal, a writ of error can then be taken to it from the Supreme Court, which will bring up the whole case from its inception.[60] So a decision of a state appellate court reversing a case, and remanding it for a new trial or for further proceedings, is not a final judgment; and the character of the judgment must be determined from the language of the judgment itself.[61] So a decision of a state appellate court reversing the decision of the lower court for denying a change of venue, and remanding the case for further proceedings, is not final.[62] But an order of a state appellate court reversing the lower court and remanding the case, with instructions to enter a certain judgment in itself a final judgment, is final.[63] And where a state appellate court is vested by the law of its state with a discretion whether to allow a writ of error or not, and on application it refuses a writ of error on the ground that the judgment below is plainly right, this is itself such a final order of the appellate court as authorizes a writ of error to it from the Supreme Court.[64]

Process of Review.

These cases can be taken to the Supreme Court by writ of error only, as only questions of law are reviewable.[65] The writ of error can be issued by the clerk of the circuit court, which includes the territory where the Supreme Court of the state sits, or by the clerk of the Supreme Court.[66] Writs of

[60] GREAT WESTERN TELEGRAPH CO. v. BURNHAM, 162 U. S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991.

[61] Johnson v. Keith, 117 U. S. 199, 6 Sup. Ct. 669, 29 L. Ed. 888; HASELTINE v. BANK, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117.

[62] Cincinnati St. Ry. Co. v. Snell, 179 U. S. 395, 21 Sup. Ct. 205, 45 L. Ed. 248.

[63] Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117.

[64] WILLIAMS v. BRUFFY, 102 U. S. 248, 26 L. Ed. 135.

[65] Rev. St. § 709 [U. S. Comp. St. 1901, p. 575].

[66] Sections 1003, 1004, Rev. St. [U. S. Comp. St. 1901, p. 713].

error in this case may be allowed by the chief justice or presiding judge of the state court, if it is a court of more than one judge, or by any justice of the United States Supreme Court. On this point the Supreme Court has spoken as follows: "Writs of error to the circuit court, under the twenty-second section of the judiciary act, issue as a matter of course, and can be obtained from the clerk of the circuit court, and, when filed in his office by the party, are duly served; but writs of error to the state courts can only issue when one of the questions mentioned in the twenty-fifth section of that act was decided by the court to which the writ is directed; and, in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction. * * *" [67]

Accordingly, where the writ of error is allowed by one of the associate judges of the state court, it is of no effect.[68] These writs of error differ from those of the circuit court in the important particular that they are not a strict matter of right. Not only in the above quotation, but in other cases, the Supreme Court has said that they must be allowed by one of the judges above named, as some security that a federal question of the character contemplated is involved in the case.[69]

The return of these writs of error is regulated by the eighth rule of the Supreme Court, under which the clerk to which the writ of error is directed makes return by transmitting a true

[67] BARTEMEYER v. IOWA, 14 Wall. 26, 20 L. Ed. 792.

[68] Butler v. Gage, 138 U. S. 52, 11 Sup. Ct. 235, 34 L. Ed. 869; Havnor v. New York, 170 U. S. 408, 18 Sup. Ct. 631, 42 L. Ed. 1087.

[69] Gleason v. Florida, 9 Wall. 779, 19 L. Ed. 730; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80.

copy of the record and all the accompanying papers under his hand and the seal of the court. He must include in this the opinion of the lower court. Under section 999 of the Revised Statutes,[70] the citation in this case must be signed by the chief justice or judge or chancellor of the state court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the opposite party must have at least thirty days' notice.

Under section 1000 of the Revised Statutes,[71] the justice or judge signing the citation has power to take the proper bond. In order for this bond to operate as a supersedeas, the writ of error must be served by lodging a copy for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. The record must show that this has been done.[72] The steps necessary to properly take a case from the state court of last resort to the Supreme Court are therefore as follows:

1. Prepare the assignment of errors and the petition for the writ of error. These are papers of the state court, and should be entitled in the state court. They can be signed by counsel.

2. Get the presiding judge of the state court to allow the writ of error. A Supreme Court justice could also do it, but ordinarily the judge of the state court is more accessible. The allowance can be indorsed at the foot of the petition for the writ of error, somewhat in the following language:

"Writ of error allowed upon the execution of a bond by ..... in the sum of $..... Said bond, when approved, to act as a supersedeas.

"Dated.....

".....

"Chief Justice of....."

[70] U. S. Comp. St. 1901, p. 712.

[71] U. S. Comp. St. 1901, p. 712.

[72] Rev. St. § 1007 [U. S. Comp. St. 1901, p. 714]; O'Dowd v. Rus-

Care should be taken to see that the signature of the judge shows that he is the chief justice or presiding judge.

3. Execute the bond with proper acknowledgments and justifications, and have the chief justice approve it. The usual way of doing this is simply to write at the bottom of it: "Approved. ....., Chief Justice of ....."

4. Get the clerk of the United States circuit court for the district to issue the writ of error, and have the presiding judge of the state court indorse at the bottom: "Allowed. ....., Chief Justice of ....."

5. Have the citation signed also by the chief justice of the state court, and attested by the clerk of that court.

6. Have the citation served, or service acknowledged.

7. Take these various papers, leave the original assignment of errors, petition for writ of error, allowance, and bond, in the state court, have copies of these papers made and attach them to the transcript of the record; attach also to the transcript the original writ of error and the original citation, with proof of service; have the clerk of the state court certify that the original of the bond was lodged in his office, and that the original writ of error was lodged there on a given date, and a copy for each one of the defendants in error (naming them), and then have him certify all the papers as follows:

"Return to Writ of Error.

"In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within-entitled cause, with all things concerning the same.

"Witness my hand and the seal of the Supreme Court of ..... this ..... day of ....."

8. Send these papers to the clerk of the Supreme Court, with an entry of appearance, and, last but not least, a check for $25.

sell, 14 Wall. 402, 20 L. Ed. 857; Board of Commissioners of Boise Co. v. Gorman, 19 Wall. 661, 22 L. Ed. 226.

REVIEW BY THE CIRCUIT COURT OF APPEALS.

199. Review by the circuit court of appeals of decisions in the cases over which it exercises appellate jurisdiction is had by means of writ of error or appeal in accordance with the general principles governing these methods.

Only final decisions of the lower courts can be made the subject of this appellate review, except that appeals are allowed by law in certain interlocutory decrees or orders granting or continuing injunctions or appointing receivers, provided certain requirements prescribed by the statute be followed in the prosecution of such reviews.

Method of Maturing Cases in the Circuit Courts of Appeals—From the District and Circuit Courts.

The time of taking these appeals is limited by the eleventh section of the act of March 3, 1891,[73] to six months after the entry of the order complained of, except where "a lesser time is now by law limited for appeals or writs of error."

One instance of such lesser time is appeals from certain interlocutory decrees, which are limited to thirty days, and appeals under section 25 of the bankrupt act, which are limited to ten days.

Character of Decisions Reviewable.

Here, too, the general rule is that only final decisions are reviewable, and the authorities heretofore quoted are applicable as indicating what are final decisions; but there is one important exception, in case of review of decisions of district and circuit courts by the circuit court of appeals. It is provided by the seventh section of the act of March 3, 1891,[74] which reads as follows: "That where upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiv-

[73] U. S. Comp. St. 1901, p. 552.
[74] U. S. Comp. St. 1901, p. 550.

er appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: provided, that the appeal must be taken within 30 days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: provided further, that the court below may in its discretion require as a condition of the appeal an additional bond."

This section has been changed from the original form by two amendments, the above quoted being the last. The hardships of injunction or receivership orders constitute the reason for making an exception to the general rule of appellate proceedings allowing only final decrees to be reviewed.

An order merely refusing to dissolve an injunction already granted is not an order continuing an injunction, in the sense of this section.[75] But an order refusing to dissolve an injunction already granted, and expressly providing that it shall be continued to the final hearing, is appealable under this section.[76]

An order appointing a receiver, though ex parte, is appealable under this provision.[77] So, too, an order confirming the appointment of a receiver.[78]

It is clear from the language of the act that orders relative to injunctions or receivers can be appealed to the circuit court of appeals only in cases which could be taken to the circuit

[75] Rowan v. Ide, 107 Fed. 161, 46 C. C. A. 214.

[76] Berliner Gramophone Co. v. Seaman, 108 Fed. 714, 47 C. C. A. 630.

[77] Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 57 C. C. A. 64.

[78] Pacific Northwest Packing Co. v. Allen, 109 Fed. 515, 48 C. C. A. 521.

court of appeals if the decree was final. Hence, if the case involved a constitutional question which could only be taken to the Supreme Court on final decree under the fifth section, an order granting an injunction or appointing a receiver in it could not be appealed to the circuit court of appeals.[79] When a case is taken to the circuit court of appeals under this provision, the latter court has the power, in its discretion, to consider the whole case, and enter a final decree in it, if it thinks the case one in which it should exercise this power.[80] In such appeals it is discretionary with the lower court whether to suspend the order of injunction or the appointment of a receiver. The language of the act speaking of suspending proceedings "in other respects" was not intended to imply that the lower court could not suspend in these respects also.[81]

Process of Review.

This may be by writ of error or appeal, according to the nature of the case. The writ of error under the provisions of section 11, already quoted, can be issued by the clerk of the circuit court or the clerk of the circuit court of appeals; and the judge of either the higher or lower court can allow the appeal or writ of error, approve the bond, sign the citation, and do all other acts necessary to perfect the appeal.[82]

Review of Decisions of Territorial Courts.

The cases from these courts which are reviewable by the circuit court of appeals are taken up by writ of error or appeal, according to their nature.[83]

[79] Dawson v. Trust Co., 102 Fed. 200, 42 C. C. A. 258.

[80] Smith v. Ironworks, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; Berliner Gramophone Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99.

[81] In re Haberman Mfg. Co., 147 U. S. 525, 13 Sup. Ct. 527, 37 L. Ed. 266; In re McKenzie, 180 U. S. 536, 550, 21 Sup. Ct. 468, 45 L. Ed. 657.

[82] Tornanses v. Melsing, 106 Fed. 775, 45 C. C. A. 615; In re McKenzie, 180 U. S. 536, 550, 21 Sup. Ct. 468, 45 L. Ed. 657.

[83] Act March 3, 1891, c. 517, § 15, 26 Stat. 830 [U. S. Comp. St. 1901, p. 554].

TRIAL IN THE APPELLATE COURTS.

200. Trials in the appellate courts are governed by rules prescribed by them under authority of law.

The first step necessary is docketing the case. In the Supreme Court this is regulated by rule 9, and it must be docketed by the return day. Substantially similar rules prevail in all the circuit courts. The next step necessary is to have the record printed. An estimate of the cost is furnished by the clerk, and the appellant must deposit the necessary funds. In the Supreme Court he must also deposit twenty-five dollars on the entry of his appearance, and most, if not all, of the circuit courts of appeals have a similar rule.

Further Proof.

The general rule as to appellate proceedings is that the case is heard on the record coming from the lower court, which is printed in advance of the hearing. There are a few cases in which further proof can be taken in the appellate court. The most important of these are admiralty cases. These cases go to the circuit courts of appeals ordinarily, and in some of the circuits, as in the First and Second Circuits, the matter of further proof is regulated by rule. In many there is no express rule on the subject, but the principle is about the same, and it corresponds with the principle which formerly governed the taking of proof in such cases in the Supreme Court. That principle is that it was only allowed where it was impossible to have the proof in the lower court—such as cases of after-discovered evidence or loss of evidence. Unless this principle were applied, courts would constantly find an entire new case made in the appellate court.[84] Rule 12 of the Supreme Court and section 698 of the Revised Statutes [85] also provide for taking new proof in admiralty in the Supreme Court. The rule and the

[84] The Mabey, 10 Wall. 419, 19 L. Ed. 963.
[85] U. S. Comp. St. 1901, p. 568.

statute were both in force before the act conferring final jurisdiction in admiralty cases on the circuit court of appeals; but, if an admiralty case should be taken to the Supreme Court —as, for instance, where it involved a constitutional and jurisdictional question—or went up by certiorari, there is no reason why this rule and statute would not still prevail, and permit the taking of new evidence in the Supreme Court when the circumstances justified it.

Another case where the Supreme Court may allow the taking of additional testimony is appeals from the court of private land claims.[86]

Briefs.

The Supreme Court and circuit court of appeals, while permitting oral argument, require printed arguments or briefs to be filed in advance of the calling of the case on the docket. The appellant's brief is required by Supreme Court rule 21* to contain a specification of the errors relied on, and various other information, rendering it easy for the judges to find out the issues involved without the necessity of constant reference to the record. Similar rules apply in the circuits. The preparation of the brief is the most responsible part of the work in the appellate courts. In these courts special care should be taken to present the facts, and only the necessary facts, as clearly as possible, and in the discussion of questions of law the brief should not be padded with a great mass of references. One or two pointed cases on each point will have more effect than a great multitude. If the judges of any appellate court were to read every single case referred to in every single brief during any one term, there is hardly a book in their library which they would not have to handle two or three times over.

In case of defeat in the appellate court, a rehearing may be

[86] Act March 3, 1891, c. 539, § 9, 26 Stat. 858 [U. S. Comp. St. 1901, p. 769].

*3 Sup. Ct. xii.

asked during the term, but cannot be asked after the term.[87] The granting of a rehearing, however, is the exception.

When the appellate court renders its decision, it notifies the inferior court thereof by sending down its mandate. In appeals from the district or circuit court to the Supreme Court, the paper goes back to the court of first jurisdiction; and in appeals from the circuit courts of appeals to the Supreme Court, also, the mandate goes direct to the district or circuit court, and not to the circuit court of appeals.[88]

[87] Bushnell v. Smelting Co., 150 U. S. 82, 14 Sup. Ct. 22, 37 L. Ed. 1007.

[88] Act March 3, 1891, c. 517, § 10, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552].

APPENDIX.

RULES OF THE SUPREME COURT OF THE UNITED STATES.

1.

CLERK.

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court, except as provided by Rule 10.

2.

ATTORNEYS AND COUNSELLORS.

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz:

I, ——— ———, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

3.

PRACTICE.

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the prac-

tice of this court;. and will, from time to time, make such alterations therein as circumstances may render necessary.

4.

BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

5.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return-day, the complainant shall be at liberty to proceed ex parte.

6.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the

hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

7.

LAW LIBRARY.

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law-books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

8.

WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit-court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such inter-

locutory orders and decrees as may be necessary to a proper review of the case.

9.

DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska and Idaho.

10.

PRINTING RECORDS.

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and

supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or

appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

11.

TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

12.

FURTHER PROOF.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, That nothing in this rule shall prevent any party

from giving oral testimony in open court in cases where by law it is admissible.

13.

OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

14.

CERTIORARI.

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the

suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

16.

NO APPEARANCE OF PLAINTIFF.

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

17.

NO APPEARANCE OF DEFENDANT.

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

19.

NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

20.

PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a

printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the ex parte argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

21.

BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least

three days before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

22.

ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: Provided, always, That a fair opening of the case shall be made by the party having the opening and closing arguments.

23.

INTEREST.

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been

sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

24.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

25.

OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

26.

CALL AND ORDER OF THE DOCKET.

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the Attorney-General.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request,

either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

27.

ADJOURNMENT.

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

28.

DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

29.

SUPERSEDEAS.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and

detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

30.

REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

31.

FORM OF PRINTED RECORDS AND BRIEFS.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

32.

WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, OR UNDER SECTION 5 OF THE ACT OF MARCH 3, 1891, CHAPTER 517.

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under section 5 of the act of March 3, 1891, chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.

33.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIALS.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing

of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

35.

ASSIGNMENT OF ERRORS.

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court;

and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9 of Rule 10.

36.

APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

37.

CASES FROM CIRCUIT COURT OF APPEALS.

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

38.

INTEREST, COSTS, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed;

which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise

provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.

9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

SERVICE OF PROCESS.

11.

No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

13.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

14.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, toties quoties, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19.

When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall un-

dertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that," &c.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they can not be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may

properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in hæc verba, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due no-

tice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the fact stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not inter-

posed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer

and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a bona-fide purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to 41st Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under

oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 8 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, &c.

"2. Whether, &c."

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48.

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court

may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, (that is to say;) "Set down upon the defendant's objection for what of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the

bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option: and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any

judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office ex-

ceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless

otherwise directed, by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue ex parte. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and reëxamination, all of which shall

be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon

his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses viva voce when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his

order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

82.

The circuit courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment,) and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the cost to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order.]

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court may direct for the protection of infants and other persons.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and

further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

The following provisions relating to equity practice are to be found in the Act of 1st of June, 1872:

Sec. 7. That whenever notice is given of a motion for an injunction out of a circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: Provided, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application can not be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear,

plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

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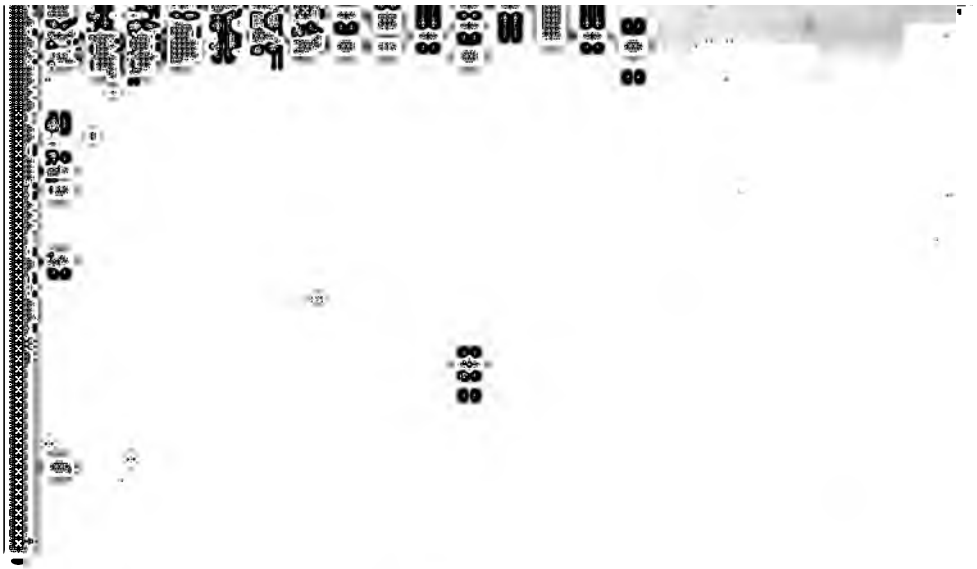

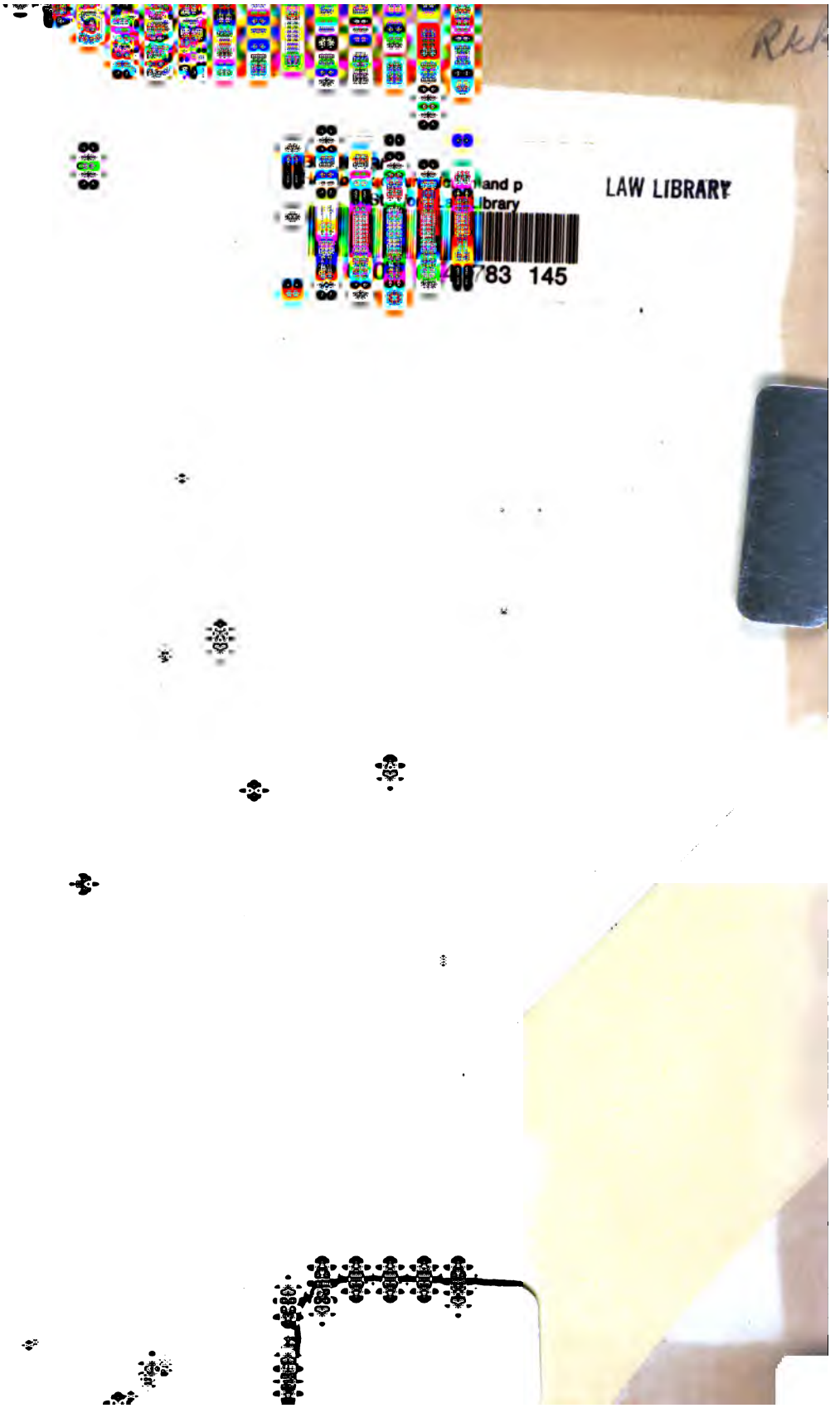
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